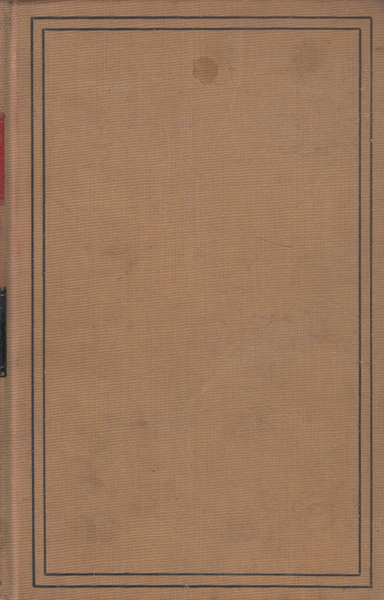












CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

FEBRUARY 1, 1927, TO JUNE 30, 1927

WITH

ABSTRACT OF
DECISIONS OF THE SUPREME COURT
IN APPEALED CASES

REPORTED BY

EWART W. HOBBS

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CONTENTS



JUDGES AND OFFICERS OF THE COURT

Chief Justice
EDWARD K. CAMPBELL

Judges

FENTON W. BOOTH
JAMES HAY

SAMUEL J. GRAHAM
MCKENZIE MOSS

Auditors

GEORGE M. ANDERSON

EWART W. HOBBS

Secretary

WALTER H. MOLING

Chief Clerk
J. BRADLEY TANNER

Assistant Clerk
FRED C. KLEINSCHMIDT

Bailiff

J. J. MARCOTTE

Assistant Attorney General

(Charged with the defense of the Government)

HERMAN J. GALLOWAY



COMMISSIONERS

(Act of February 24, 1925, 43 Stat. 964)

ISRAEL M. FOSTER, of Ohio.
JOHN M. LEWIS, of Indiana.
CARL K. RANG, of Illinois.
BENJAMIN MICOU, of Washington, D. C.
JOHN A. ELMORE, of Alabama.
RICHARD S. WHALEY, of South Carolina.
MYRON M. COHEN, of Iowa.



TABLE OF CASES

NOTE.—For cases dismissed by the Court of Claims pertaining to PAY AS CANDIDATE FOR COMMISSION, ARMY; REFUND OF TAXES; PAY OF HIGHER COMMAND, ARMY; TRANSPORTATION FURNISHED THE GOVERNMENT; and UNIFORM GRATUITY, not indexed hereunder, see pages 695 and 696.

TABLE OF STATUTES CITED

STATUTES AT LARGE

REVISED STATUTES

JUDICIAL CODE

PROCEEDINGS ON THE DEATH OF JUDGE GEORGE E. DOWNEY

At the convening of the court October 18, 1926, the following remarks were made by Assistant Attorney General Herman J. Galloway:

May it please the court and members of the bar:

At a meeting of the members of the bar of this court, held on October 11, 1926, a memorial and resolutions were adopted, and as chairman of a committee appointed at such meeting I am directed to present the same to the court. They are as follows:

Hon. George E. Downey died in the city of Washington on the 24th day of May, 1926, after a service of more than 10 years as a judge of the Court of Claims. Judge Downey had a long and distinguished career of public service. His experiences in public service prior to coming to the bench of the Court of Claims had been a most excellent training and assisted in making him unusually well qualified for his duties on the bench of this court. Included in this prior public service was his service as judge of one of the circuit courts of his native State of Indiana, of whose supreme court his father was for years an able member. Immediately before coming to the bench of the Court of Claims, Judge Downey served as Comptroller of the Treasury of the United States under appointment by President Wilson, and in 1915 President Wilson promoted him to the position of a judge in the Court of Claims.

While Judge Downey's learning and judicial ability were manifest in all lines of the work of the court, they were particularly manifest and valuable to the bench and the bar in the broad field of cases involving the application of the principles which he was called upon to elucidate and apply in his administration of the office of the Comptroller of the Treasury.

The bar of the Court of Claims recognizes in his death the loss of an earnest and devoted citizen and public official and of a learned, untiring, and impartial judge.

Be it therefore resolved by the bar of the Court of Claims at its meeting held this 11th day of October, 1926, That the bar of the Court of Claims has learned with deep regret of the death of the Hon. George E. Downey. He had a long and distinguished career in public

service. His ability and worth were recognized by the people of his own State when he was chosen as judge of one of the circuit courts of said State. Further recognition was given when he was appointed by President Wilson as Comptroller of the Treasury, and again when he was appointed as judge of the Court of Claims. To have discharged with distinction the duties of these various and important public trusts denotes that these recognitions were not unearned. The many public decisions which he made while Comptroller of the Treasury, as well as the many able opinions of this court which he wrote, reflect more clearly than we could express his ability, his learning, his earnestness, and his well-directed endeavor.

His untiring zeal in his effort to administer justice, his ability to grasp a point, and his frank and outspoken manner in the hearing of a case all contributed to his ability as a judge. Off of the bench that geniality and cordiality known especially to his more intimate friends will long be remembered by them. In his death an irreparable loss has been sustained not only by his family and the community in which he lived but also by his country and by this court, the bench, and the bar.

Be it further resolved, That the foregoing memorial and resolutions be presented to the Court of Claims with the request that they be spread upon the minutes of the court; that a copy thereof be sent to the family of the deceased and to the circuit court in Indiana over which he at one time presided; and that, upon presentation of the same to the Court of Claims, the members of the bar unite in a suitable expression of their feelings on the death of Judge Downey.

I may add that copies of such memorial and resolutions have been duly forwarded to the family of the late Judge Downey and also to the judge of the circuit court in Indiana over which he formerly presided.

When we come to speak of a man like Judge Downey we find that words are wholly inadequate to express our feeling. However, we find that little need be said, as his acts and his deeds have spoken with so much force and created for him such high regard among his fellow men that the thoughts of one with reference to him appear to be the thoughts of every other person.

When he left us the community lost a good citizen and his country an able, efficient, and well-trained public servant. So far as the limited authority of my official position will permit, I wish to here record on behalf of the Government the feeling of a great loss. It was a great pleasure to appear before Judge Downey as one of the judges of this court. We knew that he, as well as other members of this court, would readily see the point that we attempted to urge, and we felt

that if it was well taken it certainly would be sustained. I do not know how we could pay greater tribute to him than we do when we say with sincerity we believe that by his ability, his integrity, his industry, and his efforts he has placed his name among those of the greatest judges of our country.

To these and other remarks by numerous members of the bar Judge Booth replied:

It was my good fortune to know much of Judge Downey before we became associates. His distinguished father, a justice of the Supreme Court of Indiana, was dean of the law school of De Pauw University when I was a student there. His youngest brother, Frank Downey, afterwards a lawyer, was a classmate of mine during our college course. Judge Downey was himself a graduate of De Pauw University. Thus it happened that when we came into close personal contact we at once became intimate friends. Judge Downey could not have escaped the profession of the law. He was born and reared in a legal atmosphere, and no thought of pursuing any other calling ever challenged his attention. His destiny was fixed in early youth, and he turned toward the future possessed of a single ambition—to attain that high degree of proficiency which characterized the attainments of his honored father and brought reverence and respect for the family name.

Judge Downey's career is not alone disclosed in what he accomplished in the little over 10 years of his service in this court. In his native community, close by the place of his birth, he began the practice of law, and his rapid advancement and standing at the bar is attested by the fact of two elections as circuit judge for the seventh judicial circuit of Indiana when still a comparatively young man. In 1913 President Wilson appointed him Comptroller of the Treasury, and on August 3, 1915, he came to this court. President Wilson for the second time recognized his preeminent ability and rewarded his faithful public service.

We shall not on this occasion comment in detail upon the record he has left as our associate. That we confidently leave to the bar of this court and to those who may have occasion to read his opinions. The memorial the court wishes at this hour to make permanent is our appraisement and appreciation of Judge Downey as a man and intimate associate. I sometimes thought that Judge Downey's personality was such that a mere superficial acquaintance with him might engender a serious misapprehension of his true qualities of heart and hand. He lacked in some degree that rare and composite personality which does enable some men to gain an immediately favorable impression. He possessed in a marked degree that more enduring characteristic wherein time and association work their part and ultimately bring forth lasting and affectionate attachments from

those with whom he came in contact. His manner of speech was direct; the thought of clothing his opinions in language of doubtful and ambiguous import never once controlled his mental processes. He never hesitated to speak his mind. His training, his natural bent of mentality, coupled with a high degree of indisputable personal honesty, marked out this commendable characteristic of the man and gave unlimited confidence to his words and honor and respect to his every-day conduct. He did, indeed, stand forth as a conspicuous example of one who utterly lacked the inclination to dissemble.

Judge Downey was neither pedantic nor intolerant in his relations with his associates or his fellowmen. He willingly and graciously recognized honest difference of opinion, listened attentively to debate, and never hesitated to yield his convictions when convinced of error. In the courtroom, in conference, and socially he disclosed an even temperament, not easily provoked to the point of impatience or unduly petulant in the face of criticism.

From the standpoint of industry his record is complete. No judge of this court ever gave to his work more intensive devotion than Judge Downey. Not once but frequently each of us had occasion to warn him of an impending physical breakdown if he did not refrain, when ill, from long hours of continued and uninterrupted work. His ambition was to accomplish his full share of our mutual tasks. No outside interests were ever permitted to divert him from the consummation of this undertaking, and no amount of persuasion could prevail upon him to desist. He was faithful to the duties of his office, conscious of its responsibilities and its exactions. When the final summons came to him there were but a few insignificant duties left undone.

Judge Downey was a kindly and a sympathetic man. We who knew him best might easily recount events which signally emphasized his charitable instincts and his inherent inability to withhold a sympathetic feeling from one in distress. Not once in our years of association do I recall a single instance when, unannounced and irrespective of the work we had in hand, I would suddenly appear at his desk, seeking either counsel or a social chat, and receive other than a wholesome and friendly welcome. He was never too busy to be polite and never so engaged as to refuse to listen. It was almost impossible for Judge Downey to withhold a favor, if at all within his ability to grant it. He granted favors in numerous instances to persons who had no right to solicit them, and he patiently endured injustices which most men emphatically resent. He liked people; he knew the weaknesses of the race and was duly aware of the sympathetic necessity of granting allowances for shortcomings and by words and conduct extending his appreciation of the individual discomfort one suffers when overwhelmed with grief or illness.

Many times during his service here his associates had knowledge of distressing obstacles Judge Downey was called upon to surmount. Sorrow and illness came into his life, as it comes to all. He met the

crisis bravely. He solved the problems as best he could; he shielded his wounds from his family and his friends by a process of resignation to the inevitable—worthy of praise and characteristic of the man. His home life was admirable. The hours of each passing day found him either at home or at the court. As a husband, father, and grandfather he exemplified the true standards of domestic virtue, love, reverence, and devotion.

Our association with Judge Downey was a most happy and congenial one. We dwelt together for many years in close harmony and pronounced friendship. We grew to know each other, to respect each other, to care for each other, and to feel a deep and abiding interest in each other's life, a genuine attachment, which only obtains in the association of men when discord, disagreeableness, ill temper, and intolerance are absent.

Judge Downey's death was to us a personal sorrow. We loved and respected him. The very day before the sad event he sat with us in conference, bright, alert, and cheerful. We knew he was not unusually well, and had expressed among ourselves some anxiety over his condition, and had urged upon him the necessity for rest and recreation without a thought of imminent danger. We miss him, and we shall continue to miss him; he was a part of our lives; and whatever the future days may bring forth, those of us who knew him best will treasure as a priceless memory the man himself, a gentleman, an ideal judge, a most worthy and respected citizen.

Chief Justice Campbell then addressed the members of the bar as follows:

Gentlemen of the Bar:

The resolutions you have offered will be received, and what Judge Booth has said may be taken as expressive of the views of the members of the court. Those of us who labored along with him knew our brother Downey as an able judge, conscientious, patient, attentive to, and fearless in the discharge of his judicial duties.

It is ordered that the resolutions of the bar and Judge Booth's remarks be spread upon the minutes and a copy of them be sent to the family of Judge Downey. As a further mark of respect to his memory, court will stand adjourned for the day.

The court thereupon adjourned for the day.



CASES DECIDED

IN

THE COURT OF CLAIMS

FEBRUARY 1, 1927, TO JUNE 30, 1927

ANDREW L. WEIS v. THE UNITED STATES

[No. C-23]

On the Proofs

Taxes; income; exchange of stock.—Gain realized from the exchange of stock in a Michigan corporation for that in a corporation organized under the laws of South Dakota, *held* to be taxable income. *Marr* v. *United States*, 268 U. S. 536. See also *Noll* v. *United States*, 61 C. Cls. 180.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery* and *J. Marvin Haynes* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. Nelson T. Hartson* and *E. C. Lake* were on the brief.

Decided March 8, 1926. Motion for new trial overruled June 6, 1927.

The court made special findings of fact, as follows:

I. Plaintiff, Andrew L. Weis, was during the taxable year 1916 a citizen of the United States, residing at Monroe, in the State of Michigan, and was president and general manager of the Weis Manufacturing Company and the Weis-Van Wormer Company, corporations organized and existing under the laws of the State of Michigan, and also the Weis Fibre Container Corporation, a corporation organized and existing under the laws of the State of South Dakota, with an authorized capital stock of $2,000,000, and engaged in

the manufacture of a patented fibre container for liquids at Monroe, in said State.

On the 22d day of February, 1917, plaintiff and his wife, Milly A. Weis, filed with the collector of internal revenue for the first district of Michigan a joint income-tax return for the taxable year 1916, showing a net income of $40,-176.28, on which a tax of $221.76 was computed and paid.

The return so filed showed that plaintiff and his wife, the said Milly A. Weis, had received during said taxable year dividends amounting to $34,010.86 and $1,165.42, respectively, a total of $35,176.28. Of said amount of $34,-010.86 so received by plaintiff and reported as dividends on said return $9,490 represented a dividend received by him from the Weis Manufacturing Company, and the remainder of said sum of $34,010.86, amounting to $24,520.86, represented 19,461 shares of stock of the Weis Fibre Container Corporation received by said plaintiff during the taxable year 1916 and valued by him at $1.26 per share. Of said amount of dividends of $1,165.42 reported by the said Milly A. Weis in said return, $325 was a cash dividend received by her from the Weis Manufacturing Company during said taxable year to the said Milly A. Weis. The remaining portion of the said $1,165.42, amounting to $840.42, represented the aggregate value of 667 shares of stock of the Weis Fibre Container Corporation received by her during said taxable year and valued at $1.26 per share.

II. Some time after the 1916 return was filed, plaintiff received notice of the assessment of an additional tax for that year amounting to $16,241.40. On May 25, 1921, and within the time required by law, he duly filed a claim for abatement of the said additional tax, but it was subsequently disallowed.

III. Thereafter, and on May 9, 1922, plaintiff paid to the collector of internal revenue for the first district of Michigan as and for the said additional tax the sum of $16,241.40, plus $920.34 interest. This payment was made under protest to avoid penalties and the attachment of plaintiff's property.

IV. On July 12, 1922, plaintiff filed with said collector a claim for the refund of the total amount so paid, but the

same was disallowed on November 24, 1922; and the whole of the said sum of $17,161.74, together with interest thereon from May 9, 1922, is now retained and held by the United States.

V. On or about March 25, 1911, the Weis-Van Wormer Company was incorporated under the laws of Michigan, the incorporators being plaintiff, certain other stockholders of the Weis Manufacturing Company, a corporation of Michigan, and one John R. Van Wormer. Its authorized capital stock was $30,000, divided into 3,000 shares of the par value of $10 each.

VI. One-quarter of the stock of this company was issued to the said John R. Van Wormer in consideration of the transfer of the assets of a corporation of the State of Ohio known as the Van Wormer Company, and the assignment of an application for a patent covering a fibre container, designed principally to take the place of the glass milk bottle. This patent was issued on July 18, 1911, and is known as 998309. The remainder of the stock of the Weis-Van Wormer Company was issued to the stockholders of the Weis Manufacturing Company pro rata with their holdings in that company in consideration of their agreement to render financial assistance to develop the patent and put the product on the market. All of the stock was issued at the time of the formation of the company.

VII. The Weis Manufacturing Company was a close corporation, the only stockholders being plaintiff and his five brothers and two sisters. Plaintiff was at all times material to this suit the president and a director thereof. The company has been very successful.

VIII. The Weis-Van Wormer Company never did any manufacturing itself, that being done by the Weis Manufacturing Company in the plant of the latter company. The latter company also advanced the moneys necessary for the purchase of machinery, tools, etc., and the general development of the business, which on March 1, 1913, amounted to $13,117.47; subsequent to that date additional amounts aggregating $50,549.74 were advanced. The money so advanced was never repaid in cash but was always carried on the books of the Weis Manufacturing Company as a charge

against the Weis-Van Wormer Company until after the formation of the Weis Fiber Container Corporation.

IX. The Weis-Van Wormer Company never made any money and never even had a set of books.

X. About August 30, 1913, Mr. Van Wormer withdrew from the Weis-Van Wormer Company and disposed of his interest in the company pursuant to an agreement reading as follows:

"MONROE, MICHIGAN, *July 9, 1913.*

"For the payment of five thousand dollars ($5,000.00) to me in hand paid (the receipt of which is hereby acknowledged) and other valuable considerations hereinafter named—I hereby agree to sell and transfer my entire twenty-five per cent interest (25%) in the Weis-Van Wormer Company and all its interests to Andrew L. Weis on payment to me (or my heirs or assigns) the sum of five thousand dollars ($5,000.00) in cash and the entire interest of the Weis Manufacturing Company in all patents owned and held on folding cake box, with the stock of the cake box material (excepting the last shipment, amounting to $302.34, which is to be purchased at cost by me), also the dies, the glueing, folding machines, and paper-cutting machines, the above to be delivered to me at my order.

"It is further understood that should any territory for milk bottle or for package purposes be sold, either foreign or in the United States, either for cash or on a royalty basis, that I am to receive twenty-five per cent (25%) of all such returns, until fifteen thousand dollars ($15,000.00) additional to above have been paid to me.

"It is understood that this proposition is made as a guarantee as to my faith in the ultimate success of the Weis-Van Wormer paper or fibre bottle, and should it for any unforeseen reason prove not a success, then and in that event I do not expect any more payment than the five thousand dollars ($5,000.00) mentioned first and the transfer of the folding cake box business."

At the time this agreement was entered into the money that had been advanced by the Weis Manufacturing Company on behalf of the Weis-Van Wormer Company, as aforesaid, had not been repaid.

XI. The first $5,000 provided for in the agreement was paid to Mr. Van Wormer, and in July, 1916, he was paid $10,000 additional by plaintiff (this sum being later repaid to him by the Weis Manufacturing Company) in settlement of all claims that Van Wormer had under this agreement. Van Wormer's stock was distributed among the other stockholders proportionately to their stockholdings in the Weis Manufacturing Company.

XII. After Mr. Van Wormer's withdrawal from the Weis-Van Wormer Company its business was carried on as theretofore through the Weis Manufacturing Company until February, 1914, when a contract embodying the provisions of the two following resolutions was entered into between the Weis Manufacturing Company and the Weis-Van Wormer Company:

"1. Stockholders' resolution: Mr. Krantz made a motion, seconded by Mr. Rumple, that the stockholders instruct the board of directors to make a contract between the Weis Manufacturing Co. and the Weis-Van Wormer Co. in effect that, inasmuch as the Weis Manufacturing Co. did all the work and furnished the finances to develop and conduct the business of the Weis-Van Wormer Co., that the Weis Manufacturing Co. be given absolute control of all the business connected with the paper-bottle patent, etc., in the United States and foreign countries now controlled by Weis-Van Wormer Co., and that a very nominal sum be paid to the Weis-Van Wormer Co. by the Weis Manufacturing Co. each year.

"2. Directors' resolution: As per instructions from the stockholders at their annual meeting held February 17, a contract was to be drawn up between the Weis Manufacturing Co. and the Weis-Van Wormer Co. paying $25 per year for the same."

XIII. No part of the royalty called for in the contract was ever paid; and no profits were made by the Weis Manufacturing Company on the fibre container business.

XIV. On December 29, 1914, the stockholders of the Weis-Van Wormer Company adopted by unanimous vote the following resolutions:

"*Resolved*, That we pay the Weis Manufacturing Co. the sum of seventy-five thousand dollars for the release of the contract between them and ourselves, dated Feb. 24th, 1914. This sum to be paid either in cash or in stock of a new company to be formed to take over all assets of the Weis-Van Wormer Co., and known as the Weis Fibre Container Corporation.

"The above resolution was voted on and unanimously adopted. After further discussion, the following resolution was offered by Mr. Consor and seconded by Mr. Goldstein:

"'*Resolved*, That we sell to a company to be organized and known as the Weis Fibre Container Corporation for one million dollars, all our assets consisting of machines for the manufacture of containers, patents granted or applied for, contracts, and any and all other assets used in connection with the manufacture of containers. The above sum to be paid in stock of the Weis Fibre Container Corporation when the assets are turned over.'

"This motion was voted on and carried unanimously."

The new corporation provided for in the foregoing resolutions was to be formed in order to develop the before-mentioned fibre container patent, it having been determined to separate the fibre container business from the regular business of the Weis Manufacturing Company, which was the making of filing cabinets, bookcases, card cabinets, &c.

XV. Pursuant to the resolutions, and to carry out the before-mentioned purpose, the Weis Fibre Container Corporation was incorporated under the laws of South Dakota, plaintiff being one of the incorporators. The articles of incorporation were dated March 4, 1915, and the Secretary of State certified under date of March 8, 1915, that it had become a body corporate. The authorized capital stock was $2,000,000, divided into 80,000 shares of the par value of $25 each.

XVI. After the contract was entered into between the Weis-Van Wormer Company and the Weis Manufacturing Company pursuant to the resolution adopted at a meeting of the stockholders of the Weis-Van Wormer Company on February 17, 1914, the said Weis-Van Wormer Company

ceased doing business, and was dissolved on or about April 11, 1918.

XVII. On September 8, 1916, after the formation of the Weis Fibre Container Corporation all of the assets of the Weis-Van Wormer Company were transferred to the former. The physical assets remained in the factory of the Weis Manufacturing Company until the completion of the buildings of the Weis Fibre Container Corporation in 1916. In these buildings the Weis Manufacturing Company continued to manufacture the fibre container for development purposes on behalf of the Weis Fibre Container Corporation.

A formal assignment of the fibre container patent was dated September 8, 1916. The same applies to some other minor patents which had been taken out in connection with the container and machinery to manufacture it.

XVIII. The Weis Fibre Container Corporation began business with the assets which it had acquired from the Weis-Van Wormer Company, and for these assets issued to the stockholders of the Weis-Van Wormer Company $1,000,-000 par value of its stock, and to the Weis Manufacturing Company $75,000 par value of its stock; the latter either in release of the contract which that company had with the Weis-Van Wormer Company whereby it was to pay the Weis-Van Wormer Company a royalty of $25 a year on the business connected with the fibre container, or in satisfaction of the indebtedness of the Weis-Van Wormer Company to the Weis Manufacturing Company. Of this $1,000,000 of stock, however, $500,000 par value was to be held in escrow until a 6% dividend should be paid on the balance of the stock that might be issued. This stock was actually placed in escrow, and was subsequently returned to the treasury of the Weis Fibre Container Corporation without having been used or enjoyed by the persons who were entitled to it upon the fulfillment of the escrow condition. The agreement to issue the stock for these assets is evidenced by a resolution of the Weis Fibre Container Corporation reading as follows:

"Moved by Paul S. Rumpel and supported by Frank W. Ainslie that the Weis Fibre Container Corporation pur-

chase from the Weis-Van Wormer Company all patents granted or applied for, all machinery, tools, dies, and jigs used in the manufacture of the fibre containers or fibre container making machinery, all equipment used in their manufacture and owned by them, also all stock, manufactured product, orders, contracts, good will, etc.; the consideration to be $1,075,000, payable as follows: $1,000,000 of stock in this corporation at par and $75,000 in cash, cash to be payable when the balance of stock is sold and paid for. The consummation of this purchase to be dependent on the Weis Manufacturing Company agreeing to place one-half of the stock received in escrow, same to be held by a trustee, to be appointed by the directors of this corporation; also agreeing that the stock to be held shall not participate in any dividends until such time as dividends at the rate of 6 per cent are being paid on balance of outstanding stock. This stock to be released and returned to owners when 6 per cent dividend is paid on balance of stock. Purchase also depended on Weis Manufacturing Company agreeing to spend not to exceed $2,500 for the printing of prospectus, stock certificates, and necessary blanks; also for the selling of stock."

XIX. At the time of the formation of the Weis Fibre Container Corporation and the transfer of the assets of the Weis-Van Wormer Company to it the before-mentioned indebtedness of $35,549.74 of the Weis-Van Wormer Company to the Weis Manufacturing Company was outstanding.

During the taxable year 1916 the $1,075,000 of stock issued by the Weis Fibre Container Corporation in the manner and for the purposes aforesaid had a market value of $25 per share as evidenced by the fact that $800,000 of stock in the Weis Fibre Container Corporation of equal par value was sold by the Weis Fibre Container Corporation through brokers to the general public at par. The value of the $10 par value stock of the Weis-Van Wormer Company on March 1, 1913, was $40,000, and the value on said date of each share thereof was $13.33⅓.

XX. The assets of the Weis-Van Wormer Company acquired by the Weis Fibre Container Corporation for its stock of $1,075,000 as hereinbefore stated were transferred to the

Weis Fibre Container Corporation on July 20, 1916. The formal assignment of all patents held by the Weis-Van Wormer Company except the one, which was made on October 5, 1916, was made September 8, 1916. All certificates evidencing the ownership of the stock of the Weis Fibre Container Corporation were issued and delivered to plaintiff and other stockholders of the Weis-Van Wormer Company during the taxable year 1916.

XXI. At all times, after Mr. Van Wormer sold his interest in the Weis-Van Wormer Company, the stockholders were the same as those of the Weis Manufacturing Company and their stock holdings in the former were in exact proportion to their stock holdings in the latter.

XXII. The stockholders of the Weis Fibre Container Corporation at the time of the formation of the latter and until May 24, 1915, when the first stock was sold to some one other than to stockholders of the Weis-Van Wormer Company, were the same as the stockholders of the Weis-Van Wormer Company and the Weis Manufacturing Company and their stock holdings in the Weis Fibre Container Corporation were in exact proportion to their stock holdings in the other two companies. All three corporations until the sale of the stock to the general public after May, 1915, were close corporations.

XXIII. Plaintiff owned 1,460 shares of the capital stock of the Weis-Van Wormer Company and 19,461 shares of the Weis Fibre Container Corporation, one-half absolutely and one-half in escrow. The latter, however, were never fulfilled and the escrow stock was subsequently turned back as treasury stock.

XXIV. Plaintiff and other stockholders of the Weis-Van Wormer Company received direct their proportionate share of the $1,000,000 stock of the Weis Fibre Container Corporation, i. e., each shareholder of the Weis-Van Wormer Company received 13⅓ shares of the Weis Fibre Container Corporation stock. None of the stock was issued to the Weis-Van Wormer Company, for the shareholders in the company and in the Weis Manufacturing Co. were substantially identical. The plaintiff did at the initial meeting of the Weis Fibre Container Corporation vote as a stockholder the full

number of shares owned, but not yet delivered to him. He was a director and the president of the corporation. The laws of South Dakota require that a director of a corporation must hold at least 25 shares of stock of the company.

XXV. With the exception of the certificates for 7,400 shares issued to plaintiff on January 17, 1916, no certificates for capital stock of the Weis Fibre Container Corporation were issued to any of the stockholders of the Weis-Van Wormer Company until July, 1916. The 7,400 shares were issued to plaintiff to enable him to hypothecate the same for a loan thereon.

XXVI. The value of all of the stock of the Weis-Van Wormer Company on March 1, 1913, was $40,000.

XXVII. The additional tax assessed by the Commissioner of Internal Revenue was assessed on the theory that plaintiff had realized a profit of $241,927.07 on the transaction shown in the findings. This profit was arrived at by figuring the value of each of his shares of stock in the Weis-Van Wormer Company at $13.33⅓ a share and the stock which he received in the Weis Fibre Container Corporation at $25 a share, and using the number of his shares in the Weis-Van Wormer Company and one-half of the 19,461 shares in the Weis Fibre Container Corporation.

XXVIII. After an effort to sell the treasury stock of the Weis Fibre Container Corporation in 1915 and the early part of 1916, an arrangement was made to market it through certain brokers, who conducted a campaign during which between $750,000 and $800,000 par value of stock was sold at $25 a share, of which the corporation received, after deducting brokerage commissions, but $21.25 a share. At the time this stock was sold the company had no other assets than those which it had acquired from the Weis-Van Wormer Company.

XXIX. This stock was sold without the permission of the Michigan Securities Commission, which the law of Michigan provides must be obtained before transactions in corporate securities are carried out in Michigan. A temporary injunction had been entered against the commission

and it was while this injunction was in force that the stock was sold. After the injunction was lifted, the commission refused to approve the subsequent sale of any of the stock which had been sold upon the ground that the commission was "of the opinion that the sale of the stock would work a fraud on the purchaser." The declination to approve is dated May 16, 1917.

XXX. With the proceeds received from the sale of the stock, the Weis Fibre Container Corporation acquired a parcel of real estate, erected a building thereon, bought additional machinery and equipment and proceeded to manufacture the patented container and also machines for lease or sale to individual manufacturers who might wish to make their own containers. In order to have an outlet for its product, it purchased a creamery, to which it sold fibre containers manufactured by it. In the latter part of 1916 it moved to its new factory and continued its manufacturing operations there until 1923. In February, 1924, it was decided to liquidate.

XXXI. From 1917 to 1923, inclusive, the book profits and losses of the Weis Fibre Container Corporation were as follows:

	Profit	Loss
1917	$14, 515. 00	
1918	29, 957. 90	
1919	36, 862. 06	
1920		$34.38
1921		139, 287. 56
1922		120, 801. 70
1923 Approx.		80, 000. 00

XXXII. If the value to be given to the Weis Fibre Container stock which plaintiff actually received be $21.25 rather than $25, and his alleged profit be based on the value of all of the shares which he held in the Weis-Van Wormer Company, then his alleged profit was only $187,295.83, which would produce an additional tax of $5,134.80 less than the amount which he was compelled to pay by the Commissioner of Internal Revenue.

Opinion of the Court

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

This is a suit to recover income taxes. No jurisdictional question is involved. The plaintiff was financially interested to a great extent in three manufacturing corporations and this fact renders it necessary to consider the relationship of all three to each other and to the return made by the plaintiff for the purpose of income taxation.

The Weis Manufacturing Company is a Michigan corporation, engaged in manufacturing filing cabinets, bookcases, card cabinets, etc. The plaintiff was its president and general manager, also the largest single stockholder therein. The company had been incorporated prior to 1911, was a close corporation owned exclusively by the plaintiff, his five brothers and two sisters, and was doing a prosperous business. In 1911, John R. Van Wormer, an applicant for a patent covering a fibre container, a device designed by the inventor to supplant the use of glass milk bottles, interested the plaintiff in the exploitation of the same. Van Wormer had incorporated a company in the State of Ohio for this express purpose, but had not attained success. The plaintiff, as well as all the remaining holders of stock in the Weis Manufacturing Company, joined Van Wormer in the organization and incorporation under the laws of Michigan of the Weis-Van Wormer Company. This occurred about March 25, 1911.

The new company was incorporated with an authorized capital stock of $30,000, divided into 3,000 shares of the par value of $10 each. To this company Van Wormer assigned all his patent rights and the assets of his Ohio corporation for a consideration of one-fourth of its capital stock, it being further agreed that the remaining shares of stock should be issued to the stockholders of the Weis Manufacturing Company, in consideration of which financial assistance was to be rendered by the latter to the Weis-Van Wormer Company in developing and marketing the fibre container. These agreements were observed and the stock issued in pursuance thereof.

Opinion of the Court

The Weis-Van Wormer Company did not succeed. On December 29, 1914, it was indebted to the Weis Manufacturing Company in at least the sum of $50,549.74. Van Wormer had sold his interest in the company and retired therefrom, and the entire control of its business, including the patent for the container, had on February 24, 1914, been by express contract assigned to the Weis Manufacturing Company for the sum of $25 per annum. On December 29, 1914, the stockholders of the Weis-Van Wormer Company unanimously adopted a resolution to pay to the Weis Manufacturing Company the sum of $75,000 to be released from the contract of February 24, 1914. This sum was to be paid in cash or in stock of a new company to be thereafter organized to take over all the assets of the Weis-Van Wormer Company. The resolution further provided for the organization of the new company and the sale to it of all the assets of the Weis-Van Wormer Company for $1,000,000, to be paid in stock of the new company when the assets were turned over. The new company was to be known as the Weis Fibre Container Corporation.

The Weis Fibre Container Corporation was on March 4, 1915, incorporated under the laws of South Dakota. The authorized capital stock was $2,000,000, divided into 80,000 shares of the par value of $25 each. In 1916 the assets of the Weis-Van Wormer Company were turned over as agreed; but the corporation, while dormant, was not dissolved until April 11, 1918. Three thousand shares of the stock of the new corporation, of the par value of $75,000, were issued to the stockholders of the Weis Manufacturing Company as per agreement; 20,000 shares of the par value of $500,000 were likewise issued direct to the stockholders of the Weis Manufacturing Company, and the entire 23,000 shares divided among its stockholders in proportion to their holdings in the Weis-Van Wormer Company, the stockholders of the Weis-Van Wormer Company and the Weis Manufacturing Company being identical at the time. This was done as a matter of convenience. The remaining 20,000 shares issued to the stockholders of the Weis-Van Wormer Company were held in escrow until the stock of the new corporation paid a

dividend of 6%. This event never transpired and the stock was eventually turned back into the treasury. Of the remaining 37,000 shares, a sufficient number were sold to the public at $25 per share to bring into the treasury of the corporation $800,000 in cash, less the commission paid for effectuating their sale.

The plaintiff owned 1,460 shares of the capital stock of the Weis-Van Wormer Company and was to receive in exchange therefor 19,461 shares of the capital stock of the Weis Fibre Container Corporation, or an exchange on the ratio of 13⅓ per one. He actually received certificates for one-half of 19,461, or 9,730½ shares, the remaining half being held by the corporation in escrow. Plaintiff in making his return for income taxation for the year 1916 valued this stock at $1.26 per share. The Commissioner of Internal Revenue declined to accept the valuation and assessed an additional tax against the plaintiff of $16,241.40, the commissioner insisting that under the revenue law the plaintiff made a profit by the transaction of the difference between the market value of the 1,460 shares of stock which the plaintiff owned in the Weis-Van Wormer Company on March 1, 1913, which the plaintiff concedes to be $13.33⅓ per share, and the market value of the stock he acquired in the Weis Fibre Container Corporation at the time he acquired it, reaching a conclusion that inasmuch as $800,000 worth of the stock of the latter company had been absorbed by the public at $25 per share during the year 1916, that was its market value.

The plaintiff, after having an adverse ruling on his applications for abatement and refund, paid under protest the additional tax of $16,241.40, and $920.34 interest, making a total of $17,161.74, and it is for the recovery of this sum, with interest, the present suit is brought. The pertinent parts of the revenue act of 1916 are sections 1, 2, and 3 (39 Stat. 796). They are quite familiar and we need not set them forth.

The plaintiff contends that the case is within the decision of the Supreme Court in *Weiss* v. *Stearn*, 265 U. S. 242. That to all real intent and purpose it was but a reorganization or exchange of their stock in the old corporation for stock in the new, both having the same assets and hence no

taxable gain. With this contention we are unable to agree. Discarding form and observing substance, the findings clearly show that the plaintiff exchanged 1,640 shares of stock in the Weis-Van Wormer Company valued as of March 1, 1913, at $13.33⅓ per share for 19,461 shares of stock in the Weis Fibre Container Corporation, selling on the market in 1916 at $25 per share. The findings, we think, also bring this case within the following cases decided by the Supreme Court: *United States* v. *Phellis*, 257 U. S. 156; *Cullinan* v. *Walker*, 262 U. S. 134; *Marr* v. *United States*, 268 U. S. 536. The stock of the Fibre Container Corporation which ultimately reached the plaintiff as a shareholder of the Weis Manufacturing Company was a portion of the stock paid to the Weis Manufacturing Company in liquidation of the liabilities of the Weis-Van Wormer to the Weis Manufacturing Company and by the latter distributed among its shareholders as a dividend.

GRAHAM, *Judge;* HAY, *Judge;* DOWNEY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

PENN CHEMICAL CO. v. THE UNITED STATES

[No. A–337. Decided February 14, 1927]

On the Proofs

Contract; order under section 120, act of June 3, 1916; acceptance of price named.—Where a contractor has complied with an order placed with him under section 120 of the act of June 3, 1916, by delivery of the material ordered, and has accepted the price named in the order, he is bound as to the price named.

Same; objection to price named; proof of just compensation.—Where under the circumstances recited the contractor reserved the price, dissenting to the price named, he must, in order to recover, furnish proof as to a fair and just compensation.

The Reporter's statement of the case:

Mr. John H. Jackson for the plaintiff. *Messrs. Joseph R. Swan* and *Charles T. Clayton*, and *Moore, Hall, Swan & Cunningham* were on the briefs.

Reporter's Statement of the Case

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized under the laws of the State of Pennsylvania and in 1917 was engaged in the business of manufacturing wood alcohol and acetate of lime at a plant owned by it located at Hutchins, Pa.

II. On December 24, 1917, there was served on the plaintiff a paper in words and figures as follows:

WAR DEPARTMENT,
Washington.

TO PENN CHEMICAL CO., *Ridgway, Pa.*

GENTLEMEN: By virtue of the authority vested in him by the Constitution and Laws of the United States, the President of the United States, Commander in Chief of the Army and Navy, does hereby requisition for public use connected with the common defense the following necessary supplies, namely: All your existing stock of acetate of lime, wood alcohol, acetone, and ketone. Delivery of said supplies will be made as directed by the War Industries Board, and just compensation will be paid you therefor.

Pursuant to the authority of section 120 of the act of Congress, approved June 3, 1916, 39 Stat. 213, entitled "An act for making further and more effectual provisions for the national defense, and for other purposes," you are hereby directed to manufacture for the needs of the Government in the present emergency, for a just and fair compensation to be determined by the Secretary of War, the full output which your plant is capable of producing during the remainder of the fiscal year ending June 30, 1918, of acetate of lime, wood alcohol, acetone, and ketone. Delivery of said supplies will be made as directed by the War Industries Board. This order will take precedence over all other orders and contracts heretofore placed with you by any person whatsoever other than orders by the War Department, the Navy Department, or the Shipping Board. You are further notified that by the said Act of June 3, 1916, any refusal on your part to give to the United States such preference in the matter of the execution of this order or any refusal on your part to manufacture the above articles at a reasonable price, as determined by the Secretary of War, is made a felony and punishable by imprisonment for not more than three years and by a fine not exceeding $50,000; and in addition the Secretary of War is authorized to take immediate pos-

Reporter's Statement of the Case

session of your plant and through the Ordnance Department of the United States Army to manufacture the said articles.

By direction of the President:

(Signed) NEWTON D. BAKER,
Secretary of War.

Dated December 24, 1917.

Within a few days thereafter, the War Industries Board, Raw Materials Division, Wood Chemicals Section, mailed to the plaintiff an undated mimeographed letter entitled "Letter to producers of acetate of lime and crude wood alcohol in further explanation of the order of December 24, 1917," which was received by the plaintiff on or about January 1, 1918. Said letter contained, among other things, the following:

"The Secretary of War has fixed the reasonable price for acetate of lime produced after December 31st, 1917, at 4¢ per pound, f. o. b. shipping point. This price is on the basis of 80% acetate of lime by distillation test, the percentage of acetate of lime in excess of 80% or less than 80%, as the case may be, to be paid for or to be subtracted from the reasonable price, pro rata, provided that if said test falls below 77% the product shall be deemed unmerchantable.

"Payment for acetate of lime is to be made in cash, subject to examination of goods at destination. Bags are to be returned as per shipping instructions within sixty (60) days, in good condition or to be paid for by the consignees.

"Until further notice manufacturers of acetate of lime will ship or dispose of their entire output of acetate of lime through the same channels as heretofore.

* * * * * * *

"The Secretary of War has fixed the reasonable price for crude wood alcohol, as shown by said inventories as of December 31st, 1917, at 90¢ per gallon of 82° Tralles, delivered to refineries.

"The Secretary of War has fixed the reasonable price for crude wood alcohol miscible with two parts of water, produced after December 31st, 1917, at 50¢ per gallon of 82° Tralles, naked, f. o. b. shipping point.

"Until further notice, the United States waives delivery of crude wood alcohol on condition that manufacturers of crude wood alcohol ship or dispose of their entire output of crude wood alcohol to the refiners who have been receiving the same, and on the further condition that all claims for

compensation against the United States for such output and (or) delivery are waived by said manufacturers.

"All claims for shortage, poor quality, and damage in transit on any crude or refined products shall be a matter of adjustment between the consignor and consignee."

III. Between January 1st and June 30th, 1918, the plaintiff operated its plant under and in accordance with said order and made delivery of all wood alcohol and acetate of lime produced at said plant in said period as it was directed by said War Industries Board and received therefor 50¢ per gallon for said wood alcohol and 4¢ per pound for said acetate of lime, those being the prices fixed under said order by said Secretary of War.

IV. On June 25, 1918, the Wood Chemicals Section, of the War Industries Board, forwarded to the plaintiff a certified copy of Order No. 326 B/C from the Director of Purchases, Storage, and Traffic dated June 14, 1918, which said order was in words and figures as follows:

WAR DEPARTMENT,
DIRECTOR OF PURCHASES, STORAGE,
AND TRAFFIC.

Director of Purchases, Storage, and Traffic, No. 326 B/C.
War Industries Board, Chemicals Division No. 101.
To: Penn Chemical Co., Ridgway, Pa.

Pursuant to the authority of section 120 of the act of Congress approved June 3, 1916 (39 Stat. 213), entitled "An act for making further and more effectual provisions for the national defense, and for other purposes," and acting under the direction of the President of the United States, Commander in Chief of the Army and Navy, an order is hereby placed with you, for purposes connected with the national security and defense, for the entire output of acetate of lime, wood alcohol, acetone, and/or ketone, which your plant or plants are capable of producing from July first, nineteen hundred eighteen, until December thirty-first, nineteen hundred eighteen (both dates inclusive), the said products or material being of the nature and kind usually produced or capable of being produced by you.

The War Industries Board, through its representative herein designated, C. H. Conner, Wood Chemical Section, or any other representative which it may in future designate, is hereby authorized and empowered to accept delivery of said products or material; to take possession or to direct delivery thereof for the purposes mentioned above, by waiver

or otherwise and upon such terms and conditions as it may deem necessary; and to make returns to the Director of Purchase, Storage, and Traffic, Washington, D. C., of all things done and proceedings had in connection therewith.

Approved by Chemicals Division, War Industries Board.
By CHARLES H. MACDOWELL.

Approved by the Office of the Judge Advocate General.
By L. W. CALL,
Lt. Col., J. A. N. A.

Approved by Priorities Committee, War Industries Board.
By EDWIN B. PARKER.

6/12 McK.

This order will take precedence over all other orders and contracts heretofore placed with you by any person whatsoever other than prior orders by the War Department, the Navy Department, or the Shipping Board. You are further notified that by the said act of June 3, 1916, any refusal on your part to give to the United States such preference in the matter of execution of this order, or any refusal on your part to furnish the above products or materials at a reasonable price, as determined by the Secretary of War, is made a felony and punishable by imprisonment for not more than three years and by a fine not exceeding $50,000.

W-550 A. S.

Done at the city of Washington this fourteenth day of June, 1918.

By direction of the Secretary of War.

HUGH S. JOHNSON,
Brigadier General, N. A.,
For Director of Purchases, Storage, and Traffic.

On July 23, 1918, the War Industries Board, Raw Materials Division, Wood Chemicals Section, sent a letter to the plaintiff in further explanation of Order No. 326 B/C, stating, among other things, as follows:

"(A) AS TO ACETATE OF LIME

* * * * * * *

"(2) *Prices.*—We inclose a true copy of a notice to you by the War Department Board of Appraisers with regard to prices, which you should read carefully. You will note that the price of acetate of lime is on the basis of eighty per cent acetate of lime by distillation test. The percentage of acetate of lime in excess of eighty per cent or less than eighty

per cent, as the case may be, is to be added to or deducted from the reasonable price, pro rata, provided that if said test falls below seventy-seven per cent the product shall be deemed unmerchantable.

"(3) *Terms and conditions.*—Payment for acetate of lime is to be made in cash, subject to examination of goods at destination.

"Bags are to be returned within sixty days as per shipping instructions in good condition, or if not so returned to be paid for by the consignee.

"General trade conditions and terms will remain the same as at the present time.

"Claims for shortage, poor quality, and damage in transit on any crude or refined products will be matters for adjustment between the consignor and consignee.

"In order to facilitate the securing of waivers covering the distribution of acetate of lime covered by said compulsory order, the War Industries Board will permit such distribution through William S. Gray & Co., New York, without securing individual waivers from the producer on condition that William S. Gray & Co., for the purposes of such transactions, shall be deemed the agent of the producer, with the same obligations in regard to delivery of acetate of lime so distributed as devolve upon the producer by reason of said compulsory order and with authority to make requests for shipment and to waive in the name of William S. Gray & Co. any and all claims of the producer against the United States of America and/or its representatives by reason of the placing of a compulsory order for the product involved.

"(B) AS TO CRUDE ALCOHOL

* * * * *

"(2) *Prices and specifications.*—We enclose a true copy of a notice to you by the War Department Board of Appraisers with regard to prices, which you should read carefully. You will note that the price of crude wood alcohol is on the basis of 82 degrees Tralles. This should be miscible with two parts of water.

"(3) *Terms and conditions.*—All claims for shortage, poor quality, and damage in transit on any crude wood alcohol produced under the aforesaid order will be matters of adjustment between the consignor and the consignee.

"Until further notice, the United States waives delivery of crude wood alcohol, on condition that the respective producers of said crude wood alcohol ship or dispose of their entire output of crude wood alcohol at the reasonable price fixed by said Board of Appraisers and on the conditions

stated above to a refiner whose product is subject to Compulsory Order No. 326 B/C, and on the further condition that all claims for compensation from the United States and/or its representatives for said crude wood alcohol by reason of the aforesaid Compulsory Order No. 326 B/C of the Director of Purchases, Storage, and Traffic, dated June 14, 1918, are waived by said producers, and such shipments of dispositions shall constitute such waiver."

Accompanying the above-mentioned letter of July 23, 1918, was a letter from the War Department Board of Appraisers advising plaintiff that by direction of the Secretary of War the board had considered and determined that the price of four cents per pound for acetate of lime (on the basis of eighty per cent acetate by distillation test) and fifty cents per gallon for crude wood alcohol, eighty-two degrees Tralles, to be paid by the United States for the property required by the foregoing order, was a reasonable price, and that it had made a preliminary award upon such basis as just compensation for the required property when called for and accepted by the United States. The last paragraph of said letter contained the following words:

"Notice is hereby given that unless dissent to this price, if unreasonable, is filed with this board within 15 days from the date of mailing this notice by the person, firm, or corporation addressed herein it shall be conclusively presumed that hearing thereon is waived and this board will make a final award upon the terms herein stated unless, upon due notice, it is otherwise ordered. If notice of dissent to the price herein stated as reasonable is filed, as above provided, the performance of the order is not thereby suspended, but a hearing upon the reasonableness of the price will be afforded upon due notice to you of time and place, and the award of this board made thereafter will be final."

Within the prescribed time of 15 days a representative of the plaintiff filed therefor with the Board of Appraisers its dissent to the price fixed, and in interviews on or about August 6, 1918, with authorized representatives of the War Industries Board and the Board of Appraisers exhibited to them the company's financial statement and stated that plaintiff was losing money and must have relief.

On or about August 17, 1918, plaintiff's representative was advised by letter from the Board of Appraisers that the

matter of price to be paid would be investigated by the price-fixing committee of the War Industries Board.

Thereafter, and before October 30, 1918, the Federal Trade Commission made an investigation of plaintiff's affairs for the War Industries Board and reported thereon to the said board. No further action appears to have been taken in the matter by the War Industries Board before plaintiff filed with the Secretary of War its claim hereinafter referred to.

V. Between July 1 and December 14, 1918, the plaintiff delivered to consumers, as directed by the Government, its output of wood alcohol and acetate of lime produced between those dates and received therefor fifty cents per gallon for the wood alcohol and four cents per pound for acetate of lime, which were the prices fixed by the Secretary of War.

On December 14, 1918, there was delivered to the plaintiff a telegram from General George W. Goethals, Director of Purchase, Storage, and Traffic, General Staff, in the following words and figures:

WASHINGTON, D. C., *December 14, 1918.*

Compulsory order number three hundred twenty-six, dated June fourteenth, nineteen eighteen, for acetate of lime, wood alcohol, acetone, and/or ketone, is hereby terminated to take effect seven p. m., December fourteenth, nineteen eighteen, and further performance of this order shall cease at that date and hour. Done at the city of Washington, D. C., this fourteenth day of December, nineteen eighteen. By direction of the Secretary of War.

GEO. W. GOETHALS,
Director of Purchase, Storage, and Traffic, General Staff.

VI. Between January 1, 1918, and June 30, 1918, the plaintiff produced and delivered, as required by the terms of the order of December 24, 1917, acetate of lime and crude wood alcohol, and received and accepted in payment therefor the prices fixed by the Secretary of War without objection.

On July 1, 1918, plaintiff began to manufacture under the order of June 14, 1918, and continued until the termination of the order on December 14, 1918, to manufacture, produce, and deliver, according to its terms and conditions, acetate of lime and crude wood alcohol, and received and accepted

in payment, without protest, the prices fixed by the Secretary of War.

VII. The total amounts of wood alcohol and of acetate of lime produced and delivered by the plaintiff under and in accordance with both said compulsory orders between January 1 and December 14, 1918, was of wood alcohol 17,596 gallons and of acetate of lime 524,493 pounds, and the plaintiff received for said wood alcohol at the price fixed therefor under said orders $9,304.22, and for said acetate of lime at the price fixed therefor under said orders $21,350.96, and the total amount so received by the plaintiff was $30,655.18.

VIII. On January 9, 1919, the plaintiff received from the War Department Board of Appraisers a telegram worded as follows:

"If you have any claim arising under wood chemical compulsory order three two six dated June fourteen one nine one eight administered by C. H. Conner, War Industries Board, prepare same in details at once and forward to War Department Board of Appraisers, Munitions Building, Washington."

In February, 1919, the president of the plaintiff company exhibited to a member of the appraisal section of the War Department Claims Board, one Colonel Knowlton, a statement showing the operating losses of the company during the period between January 1, 1918, and December 14, 1918, which it had sustained on deliveries of acetate of lime and crude wood alcohol for the use of the Government, and stated that he desired a hearing before the Board of Contract Adjustment. Colonel Knowlton replied that he would take upon himself the responsibility for the hearing.

Some time before June 30, 1919, the exact date does not appear, the plaintiff filed a claim with the Secretary of War in the sum of $430.05 for 10,345 pounds of acetate of lime and 65 empty bags which it had on hand when the order of June 14, 1918, was terminated on December 14, 1918, and which had been purchased by the Government at the price named by the order.

On August 22, 1919, the War Department Board of Appraisers decided "that the Penn Chemical Company be given a hearing as to the propriety of increasing the price

for acetate of lime delivered under requisition and compulsory order." The plaintiff thereupon presented to the said board a statement of its operating losses in the production of acetate of lime and crude alcohol during the period from January 1, 1918, to December 14, 1918, amounting to $68,654.71.

While this claim was being considered by said Board of Appraisers the Air Service Claims Board of the War Department on December 11, 1919, recommended that the Secretary of War award to the plaintiff on the "agreement" of June 14, 1918, the sum of $426.80 as "in full adjustment, payment, and discharge of said agreement," with the provision that "the payment by the United States of this award shall operate to vest in the United States title to the property described in Schedule A, attached hereto." The award as recommended was accepted by the plaintiff December 20, 1919, by indorsement thereon according to its said terms, and on February 19, 1920, the War Department Claims Board, acting by authority of the Secretary of War, made the award as thus recommended and accepted. It was paid to the plaintiff, at what time does not appear, and payment was received by it without protest. There is no proof of any mutual mistake as to this award being in final and full adjustment of plaintiff's claims against the Government, including the claims here asserted.

On August 12, 1920, the appraisal section of the War Department Claims Board denied the plaintiff's application for increase in price, that is to say, its claim for $68,654.71, on the ground that "by producing the commodity requisitioned, making deliveries thereof, and accepting the price so fixed, the company can not be heard as to the inadequacy of these prices."

Plaintiff thereupon applied for a rehearing, which was held October 1 and 2, 1920, and by letter dated October 29, 1920, the appraisal section of the War Department Claims Board informed plaintiff that said section had on October 21, 1920, decided that plaintiff's claim of $68,654.71 for operating losses should be denied for the reason that payment had been received on the award of the Air Service Claims

Board and "acceptance of release" had been signed by the plaintiff, and that the War Department Claims Board was without authority to assume jurisdiction and issue further award.

On November 10, 1920, the plaintiff petitioned the Secretary of War for reformation of the award made by the Air Service Claims Board December 11, 1919.

On February 2, 1921, the appraisal section of the War Department Claims Board denied further relief on the ground that, although the claim for manufacturing losses had not been taken into consideration by the Air Service Claims Board in the award of $426.80, it had thereafter been disallowed on its merits. This decision was approved by the Secretary of War February 8, 1921.

IX. The wood alcohol the plaintiff had on hand at the termination of the order on December 14, 1918, was sold to the Government and paid for at the price named in the order.

X. The plaintiff sues to recover the difference between the cost of manufacturing the said acetate of lime and wood alcohol under the aforesaid orders, and the compensation named and paid therefor, and alleges that the said difference is the reasonable value to it of said products.

The evidence shows that plaintiff's plant, during the period from January 1, 1918, to December 14, 1918, was shut down for repairs at intervals totaling three months.

An audit of the plaintiff company's books show that there was expended by the plaintiff in the manufacture of the acetate of lime and wood alcohol under the aforesaid orders, over and above the price received, $35,585.08. There is no proof by which this sum may be apportioned between the periods covered by the said two orders or between the articles produced, nor is there satisfactory proof that this apparent loss in the manufacture of the material was due to inadequacy of price named in the order and paid.

There is no satisfactory proof of the cost of manufacture either of said acetate of lime or of the wood alcohol or both.

There is no proof of the market value of the materials manufactured and delivered by the plaintiff in this case.

Opinion of the Court

There is no proof of what would be a fair and just compensation for the materials supplied.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This action grows out of two orders, dated respectively December 24, 1917, and June 14, 1918, directing the plaintiff to manufacture for the Government the full production of its plant of acetate of lime and wood alcohol. The first order covered the period from the date of the order to June 30, 1918, and the second from July 1 to December 31, 1918. As to each of the orders the price was named for the articles to be manufactured. These orders were issued pursuant to the authority granted by section 120 of the act of June 3, 1916, 39 Stat. 213, known as the national defense act, which authorizes the President—

"* * * through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, corporation * * * for such product or material as may be required and which is of the nature and kind capable of being produced by such individual," etc.

"The compensation to be paid any individual for its products or material * * * shall be fair and just."

The Secretary of War is also authorized in connection with the order to state in the order what he may determine to be a reasonable price.

The material covered by the first order was manufactured and delivered without protest or objection to the price named, and that price was accepted and paid. Compliance with the order by delivery of the material, and acceptance of the price constituted a contract which was binding upon the plaintiff as to the consideration to be paid for the articles furnished. *American Smelting and Refining Co.* v. *United States*, 259 U. S. 75; *Federal Sugar Refining Co.* v. *United States*, 60 C. Cls. 184; *Consolidation Coal Co.* v. *United States*, 60 C. Cls. 608, 625; *Pocahontas Fuel Co.* v. *United States*, 61 C. Cls. 231; *Liggett & Myers Tobacco Co.* v. *United States*, 61 C. Cls. 693; *Alcock & Co.* v. *United States*,

61 C. Cls. 312; and *Daniel W. Herrman* v. *United States*, 57 C. Cls. 96, 103.

After the order of December 24, 1917, had been filed and the material paid for, the plaintiff did complain in connection with the price named in the second order, which is the same as that in the first, upon the ground that it had suffered a loss on the first order which as stated, had been completed without protest or complaint or reservation of price. Compare *Louisville Bedding Co.* v. *United States*, 269 U. S. 533, 59 C. Cls. 226; *Nelson & Co.* v. *United States*, 261 U. S. 17, 23; *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, 127; *Willard, Sutherland & Company* v. *United States*, 262 U. S. 489, 494; *Atwater & Co.* v. *United States*, *id.* 495, 498; and *Early & Daniel* v. *United States*, 271 U. S. 140, 59 C. Cls. 932, 940.

As to the order of December 24, 1917, the plaintiff was paid the price agreed upon in its contract, and it can not recover additional compensation.

The second order was dated June 14, 1918, and covered the period from July 1, 1918, to December 31, 1918. The price was named therein, and plaintiff was notified that unless dissent to the price was filed with the Board of Appraisers, War Department, within 15 days from the date of the mailing of the notice, it would be presumed that a hearing thereon had been waived and a final award would be made upon the terms stated; that, upon due notice of dissent to the price, without suspending the order a hearing upon the reasonableness of the price would be afforded, and that the award thereafter made would be final.

The plaintiff within the 15 days presented objection to the price named in the second order, and alleged a loss on the first order. The Board of Appraisers submitted the claim to the price-fixing committee of the War Industries Board for investigation, but the record does not show what that committee did in the matter. It appears, however, that the Federal Trade Commission made an investigation of plaintiff's books, but its report is not in the record.

The plaintiff continued to deliver the material and received and accepted the price named until the contract was canceled on December 14, 1918. It does not appear that it

reserved the price or that it did more than complain. Assuming, however, that it reserved the price, it would be entitled to recovery on the basis of the fair and just compensation for material supplied. The court has found that there is no proof of market value or of what would be a fair and just compensation for materials supplied. So that, in any aspect of this second order, the plaintiff can not recover more than the price named, for the reason that if it accepted that price it is bound by its contract, and if it supplied the goods and reserved the price it has furnished no proof of a fair and just compensation.

After the contract was canceled plaintiff sold to the defendant at the price fixed therein 10,345 pounds of acetate of lime and also some bags, for which plaintiff claimed $430, and was afterwards awarded $426.80, which was accepted and paid. On January 9, 1919, plaintiff was notified by the Board of Appraisers to file any claim it might have against the Government growing out of the order of June 14, 1918. Thereupon the president of plaintiff company exhibited to the board a statement claiming an operating loss of $68,654.71 on the two orders.

On August 22, 1919, the War Department Board of Appraisers took under consideration the plaintiff's claim for an increase of price for acetate of lime delivered, and plaintiff thereupon presented to the board a statement of operating losses in the production of lime and crude alcohol for the period covered by the two orders, amounting to $68,654.71. On August 12, 1920, the board denied the application for increase in price. Thereupon plaintiff applied for a rehearing, which was granted. On October 21, 1920, the board notified plaintiff of the rejection of its claim upon the ground that payment had been received on the award of the Air Service Claims Board and "acceptance of release" had been signed by the plaintiff, and that the War Department Claims Board had no authority to assume jurisdiction and make a further award. On November 10, 1920, plaintiff applied to the Secretary of War for reformation of the award of the Air Service Claims Board of December 11, 1919, and on February 2, 1921, the War Department Claims Board

denied plaintiff's claim for manufacturing losses upon the ground that the claim had been theretofore disallowed on its merits. This decision was approved by the Secretary of War on February 8, 1921.

In view of the conclusion reached it is unnecessary to discuss or pass upon the question whether plaintiff was precluded from recovering additional compensation under the second order by reason of its acceptance of the award of December 11, 1919 (Finding VIII), in which it is stated that the amount awarded was "in full adjustment, payment, and discharge of said agreement" (of June 14, 1918).

The petition should be dismissed and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

BALTIMORE & OHIO RAILROAD CO. v. THE UNITED STATES

[No. A-6. Decided February 14, 1927]

On the Proofs

Contract; construction of tracks on camp site.—See *Philadelphia, Baltimore & Washington R. R. Co.* v. *United States*, 62 C. Cls. 537.

The Reporter's statement of the case:

Mr. John F. McCarron for the plaintiff. *Mr. George E. Hamilton* was on the briefs.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Baltimore & Ohio Railroad is a corporation organized under the laws of the State of Maryland, and at the times hereinafter mentioned operated a system of railroads in interstate commerce in the United States.

II. In May, 1917, Maj. Gen. J. Franklin Bell was the commanding officer of the Eastern Department of the Army

with headquarters at Governors Island, in the State of New York, which department included the States of New York, Pennsylvania, New Jersey, Delaware, Maryland, and Virginia, and he some time in May, 1917, under the authority of the Secretary of War, appointed a board whose duty it was to select sites for cantonments within the area of said Eastern Department. Among other sites examined and considered by the said board was one at Admiral, Md. This site was situate on the electric line of the Washington, Baltimore & Annapolis Railroad. This site was finally selected, and its selection was approved by the Secretary of War on June 22, 1917, and became known as Camp Meade.

III. Before the selection of the aforesaid site was decided upon numerous consultations were had between the officers of the United States and the officers of the two railroads, to wit, the Baltimore & Ohio and the Pennsylvania Railroads, as to the trackage which would be necessary to connect the cantonment with the two railroads and which would be necessary for the purposes of the proposed cantonment. The Secretary of War through the Adjutant General of the Army instructed General Bell on June 15, 1917, as follows:

"It has recently come to the attention of the War Department in connection with the selection of sites for divisional training camps that certain railways have expected to charge the Government cost plus ten per cent for constructing railway tracks and switches connecting suitable points on their lines with proposed camp sites. In the establishment of similar camps heretofore it has been necessary for railways to so extend their lines and switches free of cost to the Government in consideration of the profit derivable from the greatly increased traffic incidental to the location of such camps. No authority has been given to any one to offer or give compensation to railways for said service. You will without delay make the contents of this message known to the controlling officials of all railways concerned in your department, informing them that no authority has been or will be given contemplating payment for such facilities in any case whatever. Where such payment is demanded, you will proceed to hunt for suitable camp sites

having other railway facilities and make no agreement to pay for facilities of above type."

IV. On June 20, 1917, General Bell met with Mr. W. W. Atterbury, vice president of the Pennsylvania Railroad Co. and also vice president of the Philadelphia, Baltimore & Washington Railroad Co., and Mr. A. W. Thompson, vice president of the Baltimore & Ohio Railroad Co., for the purpose of discussing the location of the cantonment at Annapolis Junction or Admiral (afterwards known as Camp Meade), with particular reference to the amount of trackage which the railroads would construct. As a result of this meeting the following agreement was signed. The agreement was made in triplicate; General Bell signed his name "J. F. Bell" and Mr. Atterbury and Mr. Thompson signed their initials on each copy:

85 CEDAR STREET,
NEW YORK CITY, *June 20, 1917.*

It is understood and agreed between General Bell, representing the War Department, and Mr. W. W. Atterbury, representing the Pennsylvania Railroad Company, and Mr. A. W. Thompson, representing the Baltimore & Ohio Railroad Company, that at the site for a divisional training camp known as Annapolis Junction or Admiral, these railways will construct a joint track connecting with the Philadelphia, Baltimore & Washington Railroad at Odenton, and with the Baltimore & Ohio Railroad at Annapolis Junction, a distance of approximately 6 miles, and will, if necessary, construct in addition thereto, not exceeding 2 miles of sidings or switches parallel to the main connecting line, at their own expense; the total track and sidings in no case to exceed 8 miles. All in addition to that amount to be constructed at the expense of the Government.

June 20, 1917.

W. W. A.
A. W. T.
J. F. BELL.

V. Under a verbal arrangement with the Washington, Baltimore & Annapolis Electric Railroad Co. the plaintiff used the right of way of the electric railroad and reconstructed the existing tracks by taking up the 56-mile pound rails and putting in their place 85-pound or heavier relay or used rails, replacing certain worn-out ties and rebuilding and strength-

ening the culverts and crossings, so that the track could be used by both steam and electric roads. The reconstructed portion was from Annapolis Junction to Rogue Harbor Run (Camp Meade), a distance of approximately 4 miles, or 21,875 feet, being 4,817 and 17,058 feet, respectively. This was the original location of the Washington, Baltimore & Annapolis light line from Annapolis Junction to Odenton, in the State of Maryland.

In connection with the reconstruction of said track a siding extending east from Annapolis Junction, Md., of 1 mile was also constructed by the plaintiff and put in service in the early part of September, 1917.

VI. In July, 1917, the plaintiff constructed at Annapolis Junction, 4 miles from Camp Meade and on its own land adjacent and partly parallel to the plaintiff's main line between Baltimore and Washington, a passing siding 3,158 feet in length, 65-car siding, installed additional tracks and crossovers along its main line with interlocking protection, and enlarged its station at that point, and also from time to time constructed at Annapolis Junction three wyes and a crossover, totaling 2,596 feet. These tracks were for the expeditious handling of cars from the main-line tracks from Washington and Baltimore to the main track from Annapolis Junction to Camp Meade, and were primarily for the benefit of the plaintiff in the operation of its business as a common carrier and were deemed necessary by the plaintiff. And there was no demand for them by any one having authority to speak for the United States. The cost of these facilities and construction amounted to the sum of $102,292.03.

VII. During the construction work above mentioned and prior to October, 1917, the original camp reservation had been extended by lease and purchase of certain lands south of the right of way of the Washington, Baltimore & Annapolis Railroad on which both the Baltimore & Ohio and the electric line were operating. From then the Government owned on both sides of the right of way of the Washington, Baltimore & Annapolis Electric Railroad, commencing 1 mile from Annapolis Junction and extending 3 miles

to Admiral, but acquired no interests to the right of way of the road.

VIII. In October, 1917, a remount depot was established on the land acquired by the Government to the south side of the railway right of way, east of Portland, and in order to load and unload animals a siding was ordered constructed of 902 feet in length, and a feed storehouse was built to which the Government ordered a siding constructed of 714 feet in length. During the following year this siding was lengthened 425 feet. These tracks were constructed by the plaintiff.

IX. When the warehouses at Disney were constructed the temporary sidings were made permanent by grading and laying of rails. These warehouses were erected approximately at the points designated on the original plans of the cantonment north of the main line and the sidings were constructed solely to serve these utilities of the camp. These tracks are the following numbers of feet in length, 9,387.

X. At about the time the remount-depot sidings at Portland were being constructed on the contonment site two of these sidings constructed for the contractor were converted into car-storage tracks, 1,183 feet and 1,590 feet, respectively. One of these tracks was extended, in 1918, 100 feet. These tracks were constructed for the convenience of the Government.

XI. In the latter part of November, 1917, the ordnance depot having been established between Portland and Disney on the original cantonment site and north of the main-line track to Rogue Harbor Run, a siding to serve this depot was constructed of 958 feet. During the year 1918 this siding was extended 930 feet in order to serve a grain elevator, making a total of 1,888 feet.

During the year 1918 a second ordnance track of 1,700 feet was constructed alongside of the first ordnance siding.

XII. The Government erected within the cantonment site a coal trestle, and the plaintiff and the Philidelphia, Baltimore & Washington Railroad jointly laid the ties and rails thereto and thereon for the distance of 612 feet. The plaintiff paid one-half of the construction costs and the

other half was paid by the Philadelphia, Baltimore & Washington Railroad.

XIII. In 1918 plaintiff constructed a fuel track for coal cars just east of the ordnance depot within the cantonment, and at the request of the Government, and west of the coal trestle for the distance of 1,026 feet.

XIV. In the fall of 1917, with the acquiescence and consent of the Government, the plaintiff erected for its own use a warehouse and an express shed and passenger station at Disney on the south side of the right of way, and constructed a siding of 729 feet in length to serve these buildings. These utilities were to take care of the less-than-carload shipments, express business, and passenger traffic. The Government acquiesced in the location of the buildings and consented to this siding crossing an important road.

These buildings are a combination office and express shed and freight warehouse, and the small building across the main tracks was constructed by the plaintiff for the general agent and detraining officer.

XV. The car congestion at Brunswick and at Harrisburg and other points was so great at this time and handling troops on one track so dangerous that during the months of October and November, 1917, plaintiff's officers became convinced the traffic conditions made it advisable to provide a second main track from Annapolis Junction to Rogue Harbor Run (Camp Meade), and acting on this conviction constructed from the east end of the 1-mile siding at Annapolis Junction a track of 16,662 feet in length, including two main-line crossovers and one turnout parallel to the first main track, on the roadbed and right of way of the Washington, Baltimore & Annapolis Railroad. This was an extension of the 1-mile siding extending from Annapolis Junction, and when connected made the tracks on the north side of the right of way (Nos. 1 and 4) a steam road its entire length and the tracks (Nos. 2 and 3) on the south side of the roadbed a joint steam and electric road. The number of feet claimed by the plaintiff is 16,077.

Before the construction of this second track the two roads used the same trackage, but the tracks were laid for 1 mile from Annapolis Junction on the north side of the roadbed

Opinion of the Court

and then crossed over to the south side for the remaining distance of 3 miles to Rogue Harbor Run (Camp Meade).

XVI. The reasonable cost to the plaintiff of the tracks constructed by it, for which the Government is liable under the contract entered into by it with the plaintiff, is the sum of $183,000.

XVII. The Washington, Baltimore & Annapolis Electric Railroad Co. wished to extend its electric tracks into the camp grounds, and having obtained permission to make a loop inside the camp it was found necessary to grade from Admiral under the connecting line between Odenton and Annapolis Junction (main line) and at Rogue Harbor Run up to the cantonment. This line was later abandoned, and the track for the loop was connected from the main line. This grading was for the benefit and use of the Washington, Baltimore & Annapolis Electric Railroad Co. The loop inside the camp grounds was for the accommodation of its passenger traffic.

XVIII. The claim was submitted by the plaintiff to the Secretary of War under the provisions of the act of March 2, 1919, known as the Dent Act. The claims board, transportation service, awarded the plaintiff the sum of $73,748.53, on June 25, 1920. The appeal section allowed the plaintiff the sum of $181,431.08. The Secretary of War set aside the award of the appeal section, and awarded the plaintiff the sum of $73,748.53, on September 29, 1920, which it refused to accept.

The court decided that plaintiff was entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover the sum of $430,734.50. The suit is based upon an express contract had between a representative of the plaintiff and Gen. J. Franklin Bell, acting for the Secretary of War. It is conceded that General Bell had authority to contract for the Secretary of War, and the only issue herein involved is the number of feet of track constructed by the plaintiff for the benefit of the United States under the provisions of the contract above referred to. That contract is set out in Finding IV, and it is not necessary to repeat its terms and provisions here.

We carefully considered the evidence adduced by both parties to this suit, and have arrived at what we are of opinion is a fair and reasonable compensation to the plaintiff for the tracks constructed by it for the benefit of the Government under the terms of the contract above referred to.

A judgment will be awarded the plaintiff in the sum of $183,000. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

BURKE & JAMES, INC., v. THE UNITED STATES[1]

[No. D–108. Decided February 14, 1927]

On the Proofs

Contract; cost plus fixed profit; bonus-for-savings clause; savings calculated on contractor's erroneous estimate of cost.—In a contract with the Government the contractor agreed to make airplane cameras at actual cost plus a fixed profit with "a bonus for savings effected in the cost of the articles equal to 25 per cent of the difference between the actual cost of the articles accepted and their total estimated cost." The estimate of cost was furnished by the contractor and plus the fixed profit made up the bid price, which, before the contract was signed, the contractor represented would give him a profit of approximately 10½ per cent. The actual cost was less than half the estimated cost and a bonus of 25 per cent of the difference considered as savings effected would have increased his profits to 64 per cent. The actual cost was the normal cost and not the result of efforts not required by the contract. *Held*, (1) that the bonus-for-savings clause is severable, and, there being no standard by which savings may be properly measured, without consideration; and (2) that the profits sued for, being exorbitant and unreasonable, and based on a gross error by the contractor in his estimates, he is not in equity entitled to recover.

The Reporter's statement of the case:

Mr. M. Carter Hall for the plaintiff. *Mr. David Babp, Carlin, Carlin & Hall* and *Wade & Beck* were on the briefs.

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[1] Petition for writ of certiorari dismissed.

Mr. Arthur Cobb, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Delaware, having its principal office in the city of Chicago, State of Illinois.

II. The plaintiff had been for more than 20 years and was during all the times hereinafter mentioned engaged in the development, design, manufacture, and production for the photographic trade of various types of cameras and other apparatus and supplies incident to photography.

III. In December, 1917, the defendant purchased from one Lieut. G. DeRam certain drawings and a partially constructed model of a camera designed for use in connection with airplane observations and surveys, certain features of said camera and drawings constituting the design thereof being covered by patents issued by the French Government and belonging to said Lieutenant DeRam. Shortly after the purchase of said drawings and model, an agreement was entered into between the plaintiff and defendant whereby the plaintiff undertook, in consideration of the payment to it by defendant of its cost plus a profit of 15 per cent, to design for defendant and construct, utilizing certain principles covered by said patent, an experimental model of a camera for such airplane work. The plaintiff, pursuant to this agreement, did, at a cost of approximately $30,000, develop, design, and construct said experimental model DeRam camera, notably changing and improving the preliminary design and the operation of certain of the working parts, for all of which plaintiff was fully paid.

IV. Among the several improvements accomplished by plaintiff in the redesign and development of said DeRam camera and incorporated in the experimental model thereof were provision for power operation, an efficient method of automatically transferring immediately after exposure an exposed plate from the position of exposure to a section of the plate magazine holding exposed plates and the substitution at the position of exposure of a fresh plate, an

automatic shutter for correctly timing exposures and the use of American standard instead of French and metric threads, gears, and measurements. The several changes and improvements incorporated in said experimental model of the camera as constructed by plaintiff constituted it a distinct and new type of camera, which was denominated the American Model DeRam Camera.

V. After the above-mentioned improvements had been accomplished, said model was tested jointly by officers of defendant and representatives of the plaintiff. During these tests the advisability and necessity for certain modifications, additions, and developments became apparent. These changes were agreed upon between plaintiff and defendant. Following said tests and agreement as to modifications, additions, and developments, negotiations for such further design and development of said camera as might be necessary and the construction by plaintiff of 200 American Model DeRam Cameras in which such modifications, additions, and developments would be incorporated were, during August, 1918, entered into by parties hereto. The formal request for quotation was sent plaintiff by defendant under date of August 20, 1918, in answer to which plaintiff submitted its bid, both reading as follows:

QUOTATION REQUEST NO. B-5321-1

OFFICE OF THE
BUREAU OF AIRCRAFT PRODUCTION,
DIRECTOR OF AIRCRAFT PRODUCTION,
August 20, 1918.

NOTICE.—I am directed by the Chief Signal Officer of the Army to request quotations upon the supplies listed below. Please insert prices on this sheet and return to the undersigned.

E. F. BUSH,
Office, Chief of Aircraft Purchases.

Item 1.—200 American Model DeRam Cameras, 18 x 24 cm. plate, 20″ focus, as per experimental model submitted by Burke & James, Inc., Chicago, Ill., and approved by the development branch, photographic section, Ordnance & Instrument Department, Bureau of Aircraft Production, as

per their letter of August 1st with the following changes in detail:

(*a*) The mechanism now on the inside of front plate of camera body to be mounted on a skeleton frame, so that the front plate can be removed without disturbing mechanism.

(*b*) Septums to be made of lighter steel, so that their weight will be about 7 oz. each instead of 10 oz.

(*c*) The cones to be standard size, as adopted by the French, British, and American forces.

(*d*) The shutter mechanism to be slightly modified, a gradual stop being provided for the curtain, and a complete turn of the winding gear being used in setting shutter instead of one-half turn. This change is now being made on the experimental model.

(*e*) A Bowden wire release to be provided of the type used with the "L" camera.

(*f*) Attachment for power drive to take the standard shaft, as used with "L" camera.

(*g*) Case of adequate strength to be provided to hold camera and accessories.

(*h*) Changes in methods of construction looking toward more rapid production as for example, forming three sides of body from one piece of aluminum, may be made in consultation with the photographic development branch, and the Bureau of Aircraft Production, inspection department, lenses: 20″ focus either F. 6 or F. 6.3 to be supplied by the Government and mounted in camera by the contractor.

Each of the above cameras to be placed with all necessary accessories in substantial approved field case. Unit, $1,-763.00. Total, $352,600.00.

NOTE.—Information regarding design and construction of mechanism of this camera should be restricted to those people who are only engaged in the manufacture of same. Delivery to begin ninety days after receipt of formal order. Will be completed within six months after receipt of formal order.

It is understood that we will not be held liable for delays caused by nondelivery of raw material due to shortage over which we have no control. It is further agreed that you will assist us in every way possible to secure priority certificates on all raw material entering into the construction of this camera.

On subsequent orders there will be a reduction in price according to the additional quantities ordered.

This deduction will depend largely upon raw material cost, labor conditions, and whether you will require quick delivery, thus entailing overtime at double scale of wages.

The above supplies will be furnished by the undersigned within ——— days.

F. O. B. Chicago.

Factory located at Chicago, Illinois.

BURKE & JAMES, INC.
Director G. W. MACKNESS.
[Bidder sign here.]

Date, August 20, 1918.

VI. Following the above-mentioned request for quotation and plaintiff's bid in answer thereto, defendant requested plaintiff to furnish it a statement of the profits which plaintiff would, at the price quoted, realize on the manufacture of said 200 cameras. In answer to this request plaintiff's representative, G. W. Mackness, sales manager and a director of plaintiff company, who conducted the negotiations with defendant on behalf of plaintiff, wrote defendant as follows:

AUGUST 22ND, 1918.

WAR DEPARTMENT,
Bureau of Aircraft Production,
Office of Director of Purchases,
Washington, D. C.

GENTLEMEN: As per your request for a statement showing the amount of profit accruing to us from the manufacture of the DeRam Aero Camera, which we have developed and perfected, model of which has been tested and approved by science and research division, we offer the following for your consideration:

Please be advised that the cost of production, material, dies, tools, jigs, patterns, etc., have been very carefully figured *and our maximum profit will be approximately 10½%.* If the number of cameras could be increased to 500 we could make a reduction on account of quantity production, as the cost of dies, etc., is of necessity included in the estimate of the 200 required for quick delivery. On subsequent orders of 200 minimum we could also quote a more favorable price, this depending, however, on the raw material cost, labor conditions, and whether delivery would require overtime.

It is very difficult to estimate the cost on this initial order as on account of the urgent need of this camera considerable overtime will be employed and a double shift of men will possibly be required in order to expedite production. We will be pleased to submit final costs upon completion of the work.

We trust that you can come to a decision on the matter without delay as we are all ready to start production and our organization will give the best attention to this important item. We have men, machines, and material holding off on other work awaiting your advice.

Assuring you of our earnest desire to serve you,

Yours very truly,

BURKE AND JAMES, INC.,
Per G. W. MACKNESS.

VII. Following the above-mentioned negotiations and communications the parties hereto on the ninth day of September, 1918, executed the contract, a copy of which is attached to the petition herein, marked "Exhibit A" and made a part hereof by reference.

Coincidentally with the agreement between the parties embodied in said contract the defendant gave, and plaintiff accepted, the order, copy of which is attached to the petition herein, marked "Exhibit B" and made a part hereof by reference.

VIII. Immediately following the execution of said contract and acceptance of said order plaintiff began, in accordance with the terms and provisions thereof, the further development, design, and construction of 200 American Model DeRam Cameras, employing its labor on long shifts, overtime, holiday, and Sunday work, for the purpose of expediting manufacture to the end that all deliveries would be completed by April 20, 1919, and so continued uninterruptedly to employ its labor until November 12, 1918, when it received from defendant a telegram reading as follows:

[Western Union Telegram]

XXXJ406HU 838P Nov 12 1918 354 38 Govt. Chge Walden W Shaw Maj A S A P District Mgr PH Chicago Ills.

Nov. 12, 1918—6P.

BURKE & JAMES, INC.,
240 E. Ontario St., Chicago:

You are directed to discontinue all overtime, and all night work, all Sunday work on aircraft production orders.

AIRCRAFT EXECUTIVE SHAW.
821P.

Plaintiff, without protest, accepted the directions contained in said telegram and complied with same, immediately

discontinuing all overtime, night, Sunday, and holiday work in connection with the production of said 200 cameras.

IX. On December 5, 1918, plaintiff wrote, and on December 7, 1918, defendant received, the following letter:

BURKE & JAMES, INC.,
PHOTOGRAPHIC APPARATUS & SUPPLIES,
240–258 East Ontario Street,
Chicago, December 5, 1918.

BUREAU OF AIRCRAFT PRODUCTION,
ACCESSORIES DEPARTMENT, PRODUCTION DIVISION,
Washington, D. C.

Subject—Orders #760119—760190.

DEAR SIRS: 1. We enclose herewith copy of Progress Report for the month of November submitted by the accounts section to the Finance Division.

2. The general status of this order is as follows:

(*a*) 90 per cent of the tools are completed.

(*b*) Each camera requires 342 parts. Of these, 152 piece parts for the entire order are completed. These comprise the major parts. The balance of 190 piece parts, which are the minor parts, are in a more or less finished state. These minor parts consist of screw-machine parts, springs, etc. Samples of the 190 piece parts have been submitted and O. K'd and are in the process of construction.

(*c*) Practically all the material has been received with the exception of some tubing, steel spring, and stock for the septums, which is already en route.

(*d*) One machine is being assembled from the parts received; this advance camera we expect to complete this week. We have adopted this method to prove that the parts are correct before proceeding with the general assembly.

3. The work to complete this order consists mainly of assembly. We are prepared and organized to carry this contract through to completion, and earnestly recommend that we be permitted to do so, as if it is canceled or curtailed, it will result in confusion and enormous waste. If the order is cut down it will mean that the reduced quantity will cost almost as much as the entire quantity contracted for, as elaborate and extensive preparations have already been installed.

Yours very truly,

BURKE & JAMES, INC.,
HENRY BURKE, *Secretary.*

Reporter's Statement of the Case

X. On December 5, 1918, defendant sent, and on December 6, 1918, plaintiff received, the following telegram:

DECEMBER 5, 1918.

Govt. Paid
BURKE & JAMES, INC.
Chicago, Ill.

Limit production under order number seven six naught one one nine covering two hundred DeRam cameras to a total quantity of fifty. Incur no expense beyond this amount. Acknowledge receipt immediately.

AIRCRAFT PROCUREMENT, SCHNACKE.

Approved: A. C. Downey, Lt. Col. A. S. A. P.

In answer to said telegram, plaintiff on December 6, 1918, wrote, and in due course defendant received, the following letter:

BURKE & JAMES, INC.
PHOTOGRAPHIC APPARATUS & SUPPLIES,
240–258 East Ontario Street,
Chicago, December 6, 1918.

BUREAU OF AIRCRAFT PRODUCTION,
PROCUREMENT DIVISION,
Washington, D. C.

GENTLEMEN: Receipt is acknowledged of your telegram of the 5th inst. in regard to limiting the production of the DeRam cameras under order No. 760119.

We regret exceedingly that this course has been adopted without first conferring with us on the subject, and we trust you will reconsider your decision for the reason explained in our communication of the 5th.

In the meantime we have complied with your request and have ordered all subcontractors and others to discontinue work on all except fifty of these cameras.

If, however, you decide to reinstate the entire order after considering the facts as stated in our letter of December 5, the additional parts now not already completed can be made without any material additional cost.

While we are pleased to complete the order for 50 only, we feel it our duty to apprise you of the facts as outlined in our letter of December 5.

Awaiting your further advice, we remain,

Respectfully yours,

BURKE & JAMES, INC.,
HENRY BURKE, *Secretary.*

XI. On December 10, 1918, the defendant wrote, and plaintiff in due course received, the following letter:

SUSPENSION OF WORK

PROCUREMENT CONTRACTS DIV.,
OFFICE DIRECTOR OF AIRCRAFT PRODUCTION,
Dec. 10, 1918.

BURKE & JAMES, INC.,
Chicago, Ill.

1. This letter confirms our telegram to you of Dec. 5, 1918, reading as follows:

"Limit production under order number seven six naught one one nine covering two hundred DeRam Cameras to a total quantity of fifty. Incur no expense beyond this amount. Acknowledge receipt immediately."

2. Owing to certain technical Government laws and regulations it would work hardship on a contractor if this office were to cancel this contract outright. You will, however, understand that the request that you stop production is intended virtually to effect a cancellation except as to the quantities specified for production.

3. In this connection you are advised that you should engage no new labor or replace labor without the prior approval of this office. All Sunday, night, and overtime labor should be discontinued. No new contracts should be made with suppliers or subcontractors without first obtaining the prior approval of this office.

4. The Finance Division of this bureau will make an investigation as to the expenses incurred by you which are chargeable to this contract and will furthermore endeavor to arrive at a tentative basis of settlement with your company subject to final approval by the Bureau of Aircraft Production in Washington.

By direction of the Director of Aircraft Production.

F. D. SCHNACKE,
Capt. A. S. A. P.

XII. On December 17, 1918, defendant wrote, and the plaintiff in due course received, the following letter:

Aircraft Procurement Contract Dept. Vanderwerker/AH.

OFFICE DIRECTOR OF AIRCRAFT PRODUCTION,
December 17, 1918.

BURKE & JAMES, INC.,
240 East Ontario St., Chicago, Ill.

1. Reference is made to order 760119, placed with your company September 9, 1918, for 200 American Model De-Ram Cameras, and to telegram from this department dated December 5, limiting production thereon to fifty cameras.

2. Instructions limiting production under this order to fifty cameras are hereby rescinded and you are authorized to complete production of the entire order, namely: 200 cameras, original prices to apply.

By direction of the Acting Director of Aircraft Production

F. D. SCHNACKE,
Capt. A. S. A. P.

XIII. On December 19, 1918, defendant wrote, and in due course plaintiff received the following letter:

Production Div. Expediting Department.
Nee/Amd.

WAR DEPARTMENT,
BUREAU OF AIRCRAFT DIVISION,
Dec. 19, 1918.

From: Bureau of Aircraft Division.
To: Burke & James, Inc., 240 E. Ontario St., Chicago, Ill.
Subject: Shipping Instructions on Order #760119.

1. As stated in letter from contract section, dated December 17, Order No. 760119 is reinstated for the complete amount of two hundred (200) cameras, and shipment should be made in accordance with instructions of November 22:

To: Supply officer, photographic department. Aviation General Supply Depot. Fairfield, Ohio.

Marked: "Order No. 760119—Aero."

2. As stated on face of order, material should be inspected at your factory before shipment is made.

3. Further information regarding Government bills of lading will be furnished upon request to traffic and storage branch, supply section, Division of Military Aeronautics, 6th St. & Missouri Avenue, Washington, D. C.

4. Acknowledgment of these instructions is requested, and immediate notification when shipment is made.

By direction of the Acting Director of Aircraft Production.

J. C. GRIER, Jr.,
1st Lieut. A. S. A. P.

XIV. Plaintiff manufactured and on January 2, 1919, sent to defendant for testing its first model of the camera, the production of 200 of which was provided in the above-mentioned contract; in operation this model proved deficient. Certain corrections were made by plaintiff and another model was, on February 22, 1919, sent defendant for testing; this model likewise in operation proved defective. On July 3, 1919, plaintiff sent defendant for testing its first production model of said camera in which, as a result of tests, certain minor faults in parts and fittings became apparent; this model was retained by defendant and accepted as the basic model for production, upon the condition and agreement that the faults above mentioned would be corrected in manufacture. Plaintiff completed the manufacture of the contract quantity October 29, 1919, and shipped same on January 13, 1920.

XV. If plaintiff's original plan and progress of work had been continued, in so far as its employees were required to perform overtime, double time, Sunday and holiday work, the manufacturing and production costs of said 200 cameras would have been materially in excess of such costs actually incurred. The change from high-speed performance of the contract to a slower rate of production resulted in lessening costs for overhead, overtime, and bonus for labor, with a consequent decrease in unit and total costs.

XVI. The cost to plaintiff for manufacturing and producing said 200 cameras was and is in its books and records reflected, as follows:

Material	$73, 880. 72
Direct labor	26, 784. 11
Overhead—indirect labor	10, 305. 77
Overhead—miscellaneous	15, 053. 01
Special tools	1, 555. 08
Gross total	127, 578. 69

Less:		
Cost discount	$518.24	
Salvage	100.95	
		$619.19
Net total		126,959.50
Cost per unit		634.80

The amount appearing in the item: "Overhead—miscellaneous, $15,053.01," represents the correct amount of costs for miscellaneous overhead; based on estimated percentages there had been paid by defendant to plaintiff, during the performance of the contract on account of this item, the sum of $27,098; payments to plaintiff have heretofore been made, in consideration of plaintiff's performance under said contract, on account of the items and in the amounts following:

Material		$73,880.72
Direct labor		26,784.11
Overhead—indirect labor		10,305.77
Overhead—miscellaneous		27,098.00
Special tools		1,555.08
		139,623.68
Less:		
Cost discount	$518.24	
Salvage	100.95	
		619.19
Manufacturing and production costs		139,004.49
Fixed profit		34,600.00
Total		173,604.49

XVII. The defendant supplied plaintiff a certain Bowden wire release mechanism, the design and manufacture of which were covered and protected by a patent, purchasing same from the manufacturer licensed under said patent and paying therefor the sum of $3,700; said mechanism was necessary to and incorporated in the manufacture of said cameras; had defendant not furnished said mechanism, plaintiff would have supplied same; the costs of material, labor, and overhead, without reference to royalties or patent rights, for manufacturing said mechanism would, in plaintiff's plant, have been $1,378.75; no part of the cost of this

item appears on plaintiff's books or in the statements set out in Finding XVI, above.

XVIII. The books of plaintiff show—

(a) Condensed balance sheet, end of years 1918 and 1919

			Dec. 31, 1918	Dec. 31, 1919
ASSETS				
Cash			$18,918.29	$9,758.34
Accounts receivable			114,136.64	131,679.68
Notes receivable			2,762.02	1,962.48
Merchandise inventory			427,263.28	452,265.20
Liberty bonds			15,361.37	25,320.85
Total current			578,441.60	620,986.55
Investments			1,297.69	1,297.69
Machinery and equipment			179,390.71	193,056.71
Good will, patents and trade-marks			361,183.88	361,183.88
Personal accounts and notes			11,052.99	14,827.04
Claims			----------	719.54
Deferred			52,271.93	50,717.17
			1,183,638.80	1,242,788.58
LIABILITIES				
Notes payable			110,000.00	70,000.00
Accounts payable and accrued			126,734.96	111,044.74
Total current			236,734.96	181,044.74
Reserve for taxes			7,372.79	29,000.00
Capital stock			843,600.00	843,600.00
Surplus:	1918	1919		
Bal. beginning of year	$42,697.27	$95,931.05		
Net profits	53,233.78	120,226.87		
Add: Excess reserve		170.92		
	95,931.05	216,328.84		
Less: Prfd. dividend paid		27,185.00		
			95,931.05	189,143.84
			1,183,638.80	1,242,788.58

(b) Statement of total sales and Government business as compared with same for years 1918, 1919, and 1920

Year	Total sales	Government business	Per cent Government business to total sales
1918	$1,173,024.00	$419,360.00	36
1919	1,534,801.00	565,062.00	37
1920	1,205,689.00	76,817.00	6

Opinion of the Court

(c) *Total disbursement for merchandise, productive labor, material, and all overhead charges, excepting interest on capital investment, as compared with total sales for years 1918, 1919, and 1920*

	1918	1919	1920
Productive labor	$181,493	$284,077	$273,485
Factory mdse. purchases	516,202	404,598	316,307
Direct mdse. "	206,667	226,397	239,226
New York purchases	29,510		
General expenses	332,809	467,946	466,198
Int. & disc., duty, lost acct., etc	22,420	20,760	28,938
Deferred charges (+or−)	+20,868	+35,808	*−58,128*
Inventory changes (+or−)	*−190,178*	*−25,002*	*−115,983*
Total disbursements	1,119,791	1,414,574	1,150,043
Total sales	1,173,024	1,534,801	1,205,689
Total cost	1,119,791	1,414,574	1,150,043
Profit	53,233	120,227	55,646
Per cent profit on sales	.045	.078	.046

The court dismissed the petition and gave judgment for defendant on its counterclaim.

BOOTH, *Judge*, delivered the opinion of the court:

Plaintiff, a Delaware corporation, expert in the manufacture of cameras and photographic supplies, asserts in this suit a balance due under the terms of a written contract with the defendant. Plaintiff's argument is addressed primarily to the wording of the contract contending that the clause in dispute is one factor, mutually agreed upon, as the consideration for the performance of the contract, and as such is binding upon the parties. The facts in the case, about which there is no controversy, disclose a situation which obviously renders the claim inequitable and we think illegal. In December, 1917, the Government purchased from the inventor, one Lieut. G. DeRam, drawings and a partially finished model of an airplane camera. The peculiar importance of the device at the time is found in the war-time necessity of making airplane observations and surveys. Soon after acquiring the right to manufacture the defendant contracted with the plaintiff, on a cost plus 15 per cent basis, to complete a model of the DeRam camera. This the plaintiff did by not only following the plans of the DeRam camera but by supplementing the same by several suggested

improvements and important changes. For this work the plaintiff was paid, the amount being $30,000. The model produced in accord with the foregoing contract was not in all respects satisfactory. Various tests disclosed its imperfections, and following experiments and numerous suggestions the defendant proposed an agreement for the manufacture of what is designated by the parties, "Two hundred American Model DeRam cameras," it being understood that the camera itself was in a more or less experimental shape and would require future development and changes in design. On August 20, 1918, the plaintiff responded to the defendant's proposal, and in its response set out in detail the process of manufacture, and quoted a flat consideration therefor of $352,600, or $1,763 per unit. The defendant did not promptly accede to this offer. On the contrary, it invited the plaintiff to disclose the *profit* which would accrue to the plaintiff if accepted on the basis proposed. The plaintiff, answering this request, in its letter of August 22, 1918, set forth in Finding VI, made the following statement: "*Our maximum profit will be approximately 10½ per cent*," the letter itself disclosing that the anticipated profit was computed on the basis of the plaintiff furnishing all the materials and procuring at its own expense all the special tools, dies, jigs, and patterns. Subsequently, on September 9, 1918, the contract now in suit was executed by the parties. Article V of this contract reads as follows:

"ARTICLE V.—*Price*

"1. The price the Government will pay the contractor for the articles delivered to and accepted by the Government shall be the sum of the following items:

"(a) The actual cost of such articles;

"(b) A fixed profit of one hundred and seventy-three dollars ($173) on each article;

"(c) A bonus for savings effected in the cost of the articles equal to twenty-five per cent of the difference between the actual cost of the articles accepted and their total estimated cost to wit: $1,590.00 each, but in making this computation,

Opinion of the Court

said total actual cost shall be increased by decreases therein due to changes in specifications and decreases, or to increases in the rates of wages under any act, determination, decision, or award of any Federal or State authority.

"(d) The Government furthermore agrees to reimburse the contractor, at the actual cost thereof, for the special tools, jigs, and dies, together with all engineering and instalation expenses connected therewith, which are necessary for the proper fulfillment of this contract. Title to such tools, jigs, and dies shall vest in the Government when reimbursement for the same is made."

The plaintiff proceeded with commendable zeal toward the manufacture of the cameras. As a matter of fact, up to the signing of the armistice it employed overtime and holiday labor and exerted every effort to perfect the camera and complete deliveries. On November 12, 1918, the defendant notified the plaintiff to at once discontinue overtime and holiday labor, and on December 5, 1918, directed the plaintiff to limit its manufacture of cameras under the contract to 50 in number. Later on, after quite an extended correspondence, the defendant finally rescinded its order of December 5, 1918, and on December 19, 1918, reinstated the contract under which the plaintiff, on January 13, 1920, completed the delivery of the 200 cameras. For these 200 cameras the plaintiff has been paid cost plus a fixed profit of $173 on each camera delivered.

This suit is for the recovery of $46,835.12, alleged to be due and owing under paragraph (c) of Article V of the contract, the bonus-for-savings provision. A counterclaim of the defendant for $12,044.99 is admitted to be correct, due to an error in computation of miscellaneous overhead charges. So that in the event of a judgment for the plaintiff the correct amount would be $34,790.13, and if the defendant prevails, the United States is entitled to a judgment for $12,044.99. The actual cost incurred by the plaintiff in manufacturing the cameras was $130,659.50. The difference between the actual cost and the stipulated estimated cost of $1,590 each totals $187,340.50. In other words, the plaintiff, under Article V of the contract, has received in addition to cost of material and special tools for

the actual labor expended a fixed profit of $34,600, and is now contending for an additional allowance of $46,835.12 under the bonus-for-savings clause, a sum of $12,235.12 in excess of the consideration paid for actual work and labor, resulting if allowed in a profit to the plaintiff under an expenditure which includes direct and indirect charges as well as all overtime, holiday labor, and materials of $130,-659.50, of $81,435.12. As a matter of conceded fact, each camera, instead of costing anywhere near the estimated cost, actually cost the plaintiff $634.80 each, $855.20 each less than the estimated cost, or much less than one-half the sum inserted in the contract as a standard of measuring the difference in estimated and actual cost to ascertain savings. The plaintiff, in its letter of August 22, 1918, had asserted an approximate profit of 10½ per cent. If entitled to judgment, the gross error in its estimate increases its profits to 64 per cent. That either party to the contract contemplated such a result is positively negatived by the findings, and if the contrary is to obtain, assuredly the plaintiff accomplished a bargain glaringly disproportionate to what it actually earned.

The inducement for the insertion of the figures by the defendant in the bonus-for-savings stipulation is apparent from a computation of the cost figures submitted by the plaintiff in response to defendant's proposal for bids. The plaintiff offered to manufacture the cameras for $1,763 per unit; the defendant solicited knowledge as to profits in event of acceptance of the bid. What follows? A contract is entered into fixing an estimated cost of $1,590 for each unit, a fixed profit of $173 on each unit and the sum of the two equals exactly $1,763, the amount of plaintiff's bid, and in addition to this, the plaintiff is favored with a provision imposing the cost of dies, jigs, and tools upon the defendant. Therefore, it is an inescapable conclusion that the defendant relied upon the accuracy of the plaintiff's estimate. Upon no other hypothesis may the contract be explained. That the defendant was misled in this respect needs but assertion. The unconscionable gap between the actual and estimated cost was clearly the result of plaintiff's representations, and

Opinion of the Court

it may not escape the charge, because, for years it had been engaged in camera making; it knew the needs of photography, and was expert in its line of business. The proposal emanated from it and depended for acceptance upon parties not so fortunately situated. Having then induced the defendant, through its own egregious error, to erroneously bind itself to pay for articles to be supplied a sum largely in excess of their possible worth, are the courts bound to give effect to the letter of the agreement and disregard the accumulation of exorbitant and unreasonable profits? We think not.

It was an adopted practice of officers of the Government during the stress of war-time needs to insert in some cost-plus contracts a bonus-for-savings clause. We have had before us litigation respecting clauses of this nature. Manifestly the purpose contemplated by agreeing to pay a bonus for saving was to put a premium upon economy in production and thus derive for the Government a real and substantial monetary benefit. In other words, the consideration for the undertaking was the benefit accruing to the Government by a reduction in the cost of materials below the contract allowance. The contractor's profit was assured and the Government gained in cost of materials. The case of *J. J. Preis & Co.* v. *United States*, 58 C. Cls. 81, was the first of this character. The *Preis case* failed for want of proof. Supplementary issues were discussed but not decided, the opinion concluding with this observation:

"The test in such cases is whether or not there was any benefit to be derived by the United States from the execution of the supplemental or modified contract. In the case at bar no such benefit is provided for in the supplemental contract."

The Preis contract involved the making of a large number of overcoats from material furnished by the Government. A specified quantity was expressly stipulated for each garment to be made, a fixed price to be paid therefor. The manufacturer, if he used in excess of this amount for each overcoat, did so at his own expense. The supplemental agreement provided a bonus for saving a portion of the quantity supplied; this is, for additional work and special care the manufacturer

was to receive a bonus of 20 per cent of the savings. The case, as before observed, failed for lack of proof disclosing the amount saved.

On April 13, 1925, we decided the case of *Cohen, Endel Co.* v. *United States*, 60 C. Cls. 513. This contract provided for the manufacture of overcoats, coats, and cotton breeches from a specified allowance of materials furnished by the Government and a fixed price per garment. Subsequently a supplementary contract was executed, wherein it is recited that experience has furnished the Government with knowledge of undue waste of materials in cutting garments required under the contract, and as an inducement for additional work and special care the contractor will be paid "20 per cent of the net cost price of such Government-owned materials, to the extent of the savings in uncut yardage on comparing the quantities actually used in cutting with the allowances for the purpose listed in the accompanying schedules." The proof in the case disclosed that the plaintiff, in order to earn the bonus provided for in the supplementary contract, acquired a new plant, more space, additional appliances and employees, and incurred increased expenses in the handling and measuring of the cloth as well as in wages paid to employees, and in virtue of this increased outlay succeeded in saving cloth worth to the Government 80 per cent more than was paid the plaintiff.

On this record the court was of the opinion that the supplementary contract was not without consideration and gave judgment accordingly. In its opinion the court reasserted the test announced in the *Preis case* (*supra*) and, among other things, said: "Each case must be decided upon the facts proved and the circumstances surrounding it." Finally, on January 11, 1926, we decided the case of *F. Jacobson & Sons* v. *United States*, 61 C. Cls. 420. This contract was in all essential particulars similar to the preceding ones. In the *Jacobson case*, as in the *Cohen, Endel case*, the proof established a most substantial outlay upon the part of the plaintiff to effect a saving in cloth; additional space was rented at an increased cost of $7,500 to the plaintiff, additional facilities were acquired, a reclamation department es-

tablished, and additional employees employed, as a result of which the plaintiff accomplished a reduction in yardage for each shirt manufactured from that allowed in the contract, and the Government again profited to the extent of 80 per cent of the savings effected.

These cases, confidently relied upon by the plaintiff, vary in every essential particular from the case at bar. There is an utter absence in the stipulated findings of a single fact indicating the expenditure of additional sums on the part of the plaintiff to effect a saving in materials used. Nothing appears of record to warrant a conclusion that the plaintiff exerted extraordinary care in the use of materials, employed additional labor, or in anywise did more than the precise terms of the contract exacted of it. It is neither an unjust nor an unfair deduction from the record to state that, eliminating the bonus-for-savings clause from the contract entirely, the cameras would have cost in materials exactly what they did cost. To say that with the clause in the contract the contractor saved the Government $187,340.50 in materials, or considerably more than one-half of the estimated cost, is to attach to the probative effect of this record a significance wholly unwarranted. No attempt was made to establish consideration for the savings clause, save an argument that it was an inseparable ingredient of the total price to be paid and the case is indispensably brought to the single issue of the wide margin between actual and estimated cost, and an insistence for the enforcement of the letter of the contract.

Instead of deriving benefit from the bonus-for-savings clause, the Government is penalized to the extent of paying a sum in excess of the fixed profit in the contract, and the plaintiff is to be awarded more than five times his anticipated profits without the exertion of doing more than it was under express contractual obligations to do. Surely it may not be said that the fixing of an estimated cost in the contract licensed extravagance in the use of materials. The plaintiff possessed no lawful authority to use materials in excess of the quantity necessary to make the cameras, and there is nothing in the record which even indicates an actual

saving in cost to the Government, except where by the Government's own act, it positively forbade the continuance by the plaintiff of overtime and holiday pay for labor. It is apparently inconceivable that under any of the facts narrated in this case there existed the faintest possibility of the cameras costing the estimated cost fixed in the contract. There is no contention advanced to that effect and absolutely no proof to sustain one if advanced.

In this connection it is pertinent to emphasize the unique provisions of the bonus-for-savings clause. In the cases in this court the bonus-for-savings provisions have rested for ascertainment upon fixed allowance of materials; i. e., precise yardage for each garment; and the saving effected is the comparatively small percentage between the yardage actually used and the allowance. Estimates are eliminated and the rights of the parties ascertainable upon a certain and fixed basis. The contractors obtaining judgments might have in the usual and customary method of tailoring garments consumed the entire yardage allowed and no more; but by extraordinary effort and additional expense did not pursue the customary course. Here the plaintiff is allowed no fixed amount of materials. The cost of the cameras was not limited to $1,590; no specific quantity in amount of materials was set aside for the contract, and with the exception of supervisory clauses and purchases in excess of $25,000 the plaintiff might, if necessity impelled, have exceeded the estimated cost in making the cameras. True, the contract contained an inducement to practice economy. This was a mere option, in no way mandatory, so that in its final analysis the plaintiff procures a contract obligating the Government to pay a fixed consideration by way of fixed profits and a contingent liability to pay more if savings are effected upon a purely hypothetical basis. Such an agreement is closely akin to a unilateral contract and accords to the plaintiff all the beneficial interests of the undertaking and imposes upon the Government an express obligation to pay under certain circumstances far more for an article of necessity than the article can possibly be worth. It is axiomatic, an early rule of law, and consistently adhered to, that a

Government officer is without lawful authority to give away the rights of the Government. A clause in a Government contract without consideration is nonenforceable. The public nature of the undertaking works no distinction in the application of the rule. In the absence of express authority so to do, a Government officer may not pay gratuities for the performance of contractual duties which, under the very terms of the contract, the contractor is obligated to perform.

The plaintiff vigorously contends that the bonus-for-savings clause of the contract being "a part and parcel of the *original and only contract*" and imposing upon the plaintiff no additional obligation or responsibility as a consideration for the additional compensation, is but one factor for the ascertainment of the total consideration to be paid—an argument doubtless predicated upon the compensation clause, Article V of the contract. This clause reads in part as follows:

"The price the Government will pay * * * shall be the sum of the following items." Then follows "(a) the actual cost of such articles; (b) a fixed profit of one hundred and seventy-three dollars ($173) on each article," concluding with paragraph (c), the bonus-for-savings clause. This in effect is the equivalent of saying that the consideration expressed in a contract for its performance may not be challenged in part, notwithstanding it is grossly exorbitant and gratuitous in its nature. The fact that parties to an agreement, standing upon an equal footing, with equal opportunities to know, and knowing the consequences of the undertaking, will, in the absence of fraud, be held to the terms of the contract, does not preclude an assertion that the agreement was founded upon a lack of or an illegal consideration. One may, of course, within certain limitations, agree to pay more than an article is worth, and if the article is delivered in accord with the contract, the contract will be enforced; but that is not the case here. The plaintiff fixes the consideration at which it is willing to undertake the production of the article the defendant wants, viz: Cost plus a profit of $173, and this amount the defendant pays without protest or complaint. The cause of action here is upon an inde-

pendent stipulation alleging a right to recover more than the stipulated profit, not in output but in savings. If, then, from the record the court is convinced that the cost of producing the article, as shown from the plaintiff's books of account, is clearly normal, that under no circumstances would the plaintiff have been justified in spending more or less, then an agreement to pay for savings when no savings accrued is manifestly without consideration, and unless we may have recourse to the standard of measuring savings we may not award the plaintiff judgment. In our view of the case a stipulation to pay cost plus a profit and a percentage of savings in production are clearly severable and depend for enforcement upon an entirely different character of proof.

The plaintiff's cause of action fails for another reason. It is obviously futile to contend that the sum now sued for would not result in the award of profits grossly exorbitant and unreasonable. Without challenging the good faith of the plaintiff we may with propriety advert to the fact that its own books of account convict it of gross error in making its estimate of cost, an error so palpably wrong that to take advantage of it is imposing a penalty upon the defendant who clearly relied upon its accuracy. As a result of plaintiff's gross mistake the defendant, instead of procuring cameras at a reasonable price, is asked to pay nearly six times the estimated profits and receive in return nothing but the cameras, for there is no evidence that the plaintiff purchased, or had occasion to purchase, or turned back to the Government, $187,340.50 worth of material. A contract which results in profits of 64 per cent and brings into the plaintiff's treasury a sum in excess of the fixed profits awarded is assuredly closed to a contention that the profits are not gross, exorbitant, and unreasonable. In *Hume* v. *United States*, 132 U. S. 406, the Supreme Court had before it a Government contract not essentially different in its important aspects from the contract in suit, and the court declined to enforce it. Chief Justice Richardson, in delivering the opinion of this court in the *Hume case*, after reviewing the English and American authorities on the subject, said:

"The court in its opinion cited the case of *James* v. *Morgan* and other cases, and said there is not in either of these cases any evidence of actual fraud or deception on the part of the plaintiff at the time of making the bargain. The fraud, if it is necessary to suppose any in this case, consisted in afterwards taking advantage of the defendant's ignorance or mistake, and of attempting to enforce the performance of a contract, such, as Lord Hardwicke expresses it, 'as no man in his senses would make or as no honest man would come into.' These citations are sufficient to show that in suits upon unconscionable agreements the courts of law will take the matter in their own control and will, without the intervention of courts of equity, protect the parties against their enforcement. If it be so in suits on contracts between private parties who act by and for themselves, how much more is it so in suits on agreements by the United States, acting always through public officers, who are mere agents, required to act in good faith toward their principal according to the laws of the land, as everybody dealing with them are bound to know."

The case before us reflects the importance of the rule. The defendant, wholly inexperienced in the cost of producing a new and improved photographic device, seeks out one skilled in this particular art, relying wholly upon the ability of the contractor to state within reasonable proximity the cost of its manufacture. The basis of the plaintiff's estimate is not even asked. Whatever may have been the cause of the result, it is true that what followed may not be said to have been within the contemplation of the parties to the contract, and if it were otherwise there is no doubt as to the effect. The defendant would not have agreed to pay the sum now claimed had knowledge of the situation obtained. The good faith of this transaction resolves itself into a simple formula; i. e., the defendant was misled by the gross error of the plaintiff to subscribe to a contract which results clearly demonstrate as unreasonable and unconscionable. Defendant did what it would not have done except for this gross error. Shall the defendant then respond to the plaintiff for doing what the plaintiff's error

led it into doing, and which otherwise it would not have done?

Justice Swayne observed in *Scott* v. *United States*, 12 Wall. 443, 445:

"If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages not according to its letter, but only such as he is equitably entitled to."

See also *Beard* v. *United States*, 3 C. Cls. 122; *Bassick* v. *Aetna Explosive Co.*, 246 Fed. 974.

The petition should be dismissed. Judgment for defendant in its counterclaim in the sum of $12,044.99.

MOSS, *Judge*, and CAMPBELL, *Chief Justice*, concur.
GRAHAM, *Judge*, and HAY, *Judge*, dissent.

ARIZONA EASTERN RAILROAD CO. v. THE UNITED STATES

[No. A-77. Decided February 14, 1927]

On the Proofs

Railroad rates; military impedimenta in Arizona, Federal and State; special rates to the State.—A rate of 2 cents per ton per mile on military equipment of the State of Arizona transported within said State is not applicable to Federal property, which, in the absence of distinctive rates, must take the rates open to the public for like transportation.

The Reporter's statement of the case:

Mr. William R. Harr for the plaintiff. *Harr & Bates* were on the brief.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation and a common carrier of freight and passengers.

II. During the years 1916 and 1917 the plaintiff, as sole or last carrier, upon due request made upon Federal Gov-

ernment bills of lading, transported certain Army impedimenta, the property of the United States, between points entirely within the State of Arizona.

III. The schedule annexed to the amended petition herein correctly shows the Government bills of lading involved, the dates thereof, plaintiff's bills or vouchers covering the same, the amounts claimed by the plaintiff in said bills or vouchers, and the amounts disallowed by the accounting officers of the Government with respect thereto.

IV. (1) For a part of the aforesaid services the plaintiff presented bills to the defendant's accounting or disbursing officers at the published commercial tariff rates open to the public for like or similar transportation, and through various adjustments, not here material, was paid by the defendant $12,281.20 less than plaintiff had claimed in its said bills, and this sum remains unpaid.

(2) For the balance of the said services the plaintiff presented its bill to the defendant's officers at a net cash rate published by it for special-train service. The plaintiff reduces its claim thereon to the basis of specific commercial rates for ordinary freight-train service. Through settlement by the accounting officer, the plaintiff was paid thereon $224.75 less than the amount due on said basis of specific commercial rates for ordinary freight-train service, and this sum remains unpaid.

V. For all the services so rendered the plaintiff was paid by the defendant freight charges at the rate of 2 cents per ton of 2,000 pounds per mile, published by the plaintiff in its tariff No. 20-B, pursuant to a law of the State of Arizona and an order of the corporation commission of said State, applying between all stations in Arizona on articles described in said tariff as follows: "Military equipment consisting of arms, camp equipage, horses, materials, and stores, any quantity, * * * only when belonging to military department of the State of Arizona."

VI. Said shipments were all made upon the usual Government form of bill of lading prescribed by the Comptroller of the Treasury, and upon their accomplishment (except in the two instances referred to in the next paragraph), plaintiff presented the same to the disbursing or accounting offi-

Opinion of the Court

cers of the defendant together with its bills or vouchers stating the charges for said transportation at the published freight tariff rates open to the public for like or similar transportation—that is to say, at what were known as the "commercial" rates.

In the two instances above mentioned as exceptions (Government bills of lading WQ–84, dated July 23, 1917, and WQ–101, dated July 25, 1917), plaintiff stated its charges for the transportation involved (A. E. R. R. Co. bill F–1300) at the net cash rate published by it for special-train service. Prior to the trial of this case, however, plaintiff waived its claim that special-train service was requested and furnished in these two instances, and reduced its claim upon these items to the basis of the commercial rates for ordinary freight-train service.

The court decided that plaintiff was entitled to recover $12,505.95.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The railroad company transported certain property of the Government between points within the State of Arizona. The shipments were made on Government bills of lading of approved form, and upon their accomplishment the plaintiff presented the same with its bills and charges, and the amounts claimed were reduced by the disbursing or accounting officers to the basis of the rate in a tariff published by plaintiff pursuant to a law of the State of Arizona for 1912 and an order of the corporation commission of that State. The rate thus provided was 2 cents per ton of 2,000 pounds per mile on military equipment consisting of arms, camp equipage, horses, materials, and stores, and to be applied only to shipments belonging to the "Military Department of the State of Arizona" and moving within the State.

The deductions by the Government officers from plaintiff's bills were upon the theory that the Government was entitled to the rate provided by this intrastate rate which, in terms, applied to property of the State. The carrier was

authorized to make concessions to the State on intrastate shipments, and having seen fit to do so it did not thereby make the rate, so fixed, applicable to other property or a different shipper.

It has been said of section 22 of the act to regulate commerce, as amended, 25 Stat. 862, that it preserves the right of the carrier of granting in its discretion preferential treatment to particular classes in certain cases, among those classes named in the statute being the United States, State, and municipal governments, but "it confers no right upon any shipper or traveller. Nor does it confer any new right upon the carrier." *Nashville Railway* v. *Tennessee*, 262 U. S. 318, 323. (See note to this case (p. 324) relative to ruling of the Interstate Commerce Commission.)

The stipulation states that the plaintiff's bills stated the charges for said transportation "at the published tariff rates open to the public for like or similar transportation, that is to say, at what were known as the commercial rates." The tariff has not been introduced in evidence but this stipulation covers the material question, in that it shows that the plaintiff's bills were at the rates open to the public for like transportation. There were no rates distinctively applicable to property of the United States.

The Federal Government could have arranged with the company for a different and reduced rate if the company was so disposed. See *Atchison, Topeka & Santa Fe Ry. Co. case*, 256 U. S. 205, 206. It did not make any such provision or agreement, and we can only apply to its shipment a rate open to the public. This rate, according to the stipulation, was the one used by plaintiff in its bills. We conclude the plaintiff is entitled to judgment for the amount of the deductions. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

Reporter's Statement of the Case

CLAUS SPRECKELS, GRACE HAMILTON, LILLIE WEGEFORTH, ALEXANDER HAMILTON, WALTER D. K. GIBSON, AND WILLIAM H. HANNAM, EXECUTORS OF THE WILL OF JOHN D. SPRECKELS, DECEASED, v. THE UNITED STATES

[No. A–111. Decided February 14, 1927]

On the Proofs

Taking possession of vessel; act of June 15, 1917; return in altered condition; just compensation.—Plaintiffs' decedent, having delivered possession of his pleasure yacht to the Navy under requisition, authorized by the act of June 15, 1917, which names the charter money which will be paid monthly as just compensation for its use, was entitled, upon its return in altered condition, to reasonable compensation for the cost to him of restoring the vessel to its original condition and for the loss of the use of his yacht from the date of the last rental payment until such time as the reconditioning could, by the exercise of due diligence, have been accomplished.

The Reporter's statement of the case:

Mr. Lawrence H. Cake for the plaintiff. *Mr. Alexander Britton* and *Britton & Gray* were on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On June 7, 1926, after the filing of this suit, John D. Spreckels, plaintiff therein, died, leaving a will in which he named Claus Spreckels, Grace Hamilton, Lillie Wegeforth, Alexander Hamilton, Walter D. K. Gibson, and William H. Hannam as executors, and they, having qualified as such executors, were by order of this court substituted as parties plaintiff.

At the times hereinafter mentioned, plaintiffs' decedent, a citizen of the United States, was sole owner of a steam yacht, the *Venetia*, acquired by him for use as a pleasure craft, and said yacht was so used during all the time it was in his possession.

II. July 13, 1917, the following telegram was sent from the Secretary of the Navy to the decedent:

JULY 13, 1917.

MR. JOHN D. SPRECKELS,
60 California Street, San Francisco, Calif.:

The exigencies of the Navy in war demand the acquirement of your ship *Venetia*. Under the law I am sending you notice to that effect. If you prefer to lease or tender it without this procedure wire to-day and state your desires.

SECRETARY OF THE NAVY.

July 13, 1917, the Secretary of the Navy wrote decedent as follows:

JULY 13, 1917.

SIR: The President has directed me to inform you that, by virtue of the power and authority vested in him by the act entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments, etc., approved June 15, 1917," your ship, the *Venetia*, will be acquired by the Navy.

The *Venetia* has been inspected, and an appraised value placed upon the vessel. A reappraisal will be made by a board of appraisal to determine the just compensation to be made for the vessel and her equipment.

You are authorized to appear before, or communicate with this board and to present to it, orally or in writing, all the evidence you desire taken into consideration in determining the amount of such compensation. This evidence must be presented at such time as the board of appraisal may set.

The address of the board of appraisal is No. 26 Cortlandt Street, New York.

Your attention is invited to the provisions of the act before mentioned regarding compensation. A copy of that portion of the act relating thereto is inclosed.

You will be informed of the amount determined upon as a just compensation for said vessel.

Very respectfully,

JOSEPHUS DANIELS,
Secretary of the Navy.

MR. JOHN D. SPRECKELS,
60 California Street, San Francisco, Calif.:

July 14, 1917, Capt. A. S. Halstead, senior member of the Naval Board of Appraisal for Merchant and Private Vessels, wrote decedent as follows:

NEW YORK CITY, *July 14, 1917.*

JOHN D. SPRECKELS, Esq.,
60 California Street, San Francisco, Calif.

DEAR SIR: The Navy Department has informed the board of appraisal that the President of the United States has directed the acquisition of the *Venetia*, and has directed the board to report to the Secretary of the Navy a just compensation for this vessel.

You are, therefore, requested to forward to this board, in writing, as soon as practicable, all the evidence you desire taken into consideration in determining the amount of such compensation, including, for example, authentic data as to the original cost of vessel, and, in case you are not the original owner, the date of purchase and purchase price paid by you; also a definite and concise statement of the amount spent by you in alterations, additions, and upkeep, etc.

In case you elect to present the evidence in person, you are requested to inform the board, as soon as practicable, the earliest date on which you will be able to present to the board the above-mentioned evidence in order that a date may be set for your hearing.

The next meeting of the board of appraisal will be at 10 a. m., Wednesday, July 18.

The favor of the acknowledgment of the receipt of this letter is requested.

Very truly,

A. S. HALSTEAD,
Captain, United States Navy, Senior Member.

July 24, 1917, decedent replied to Captain Halstead as follows:

STEAM YACHT "VENETIA"

SAN FRANCISCO, CALIF., *July 24, 1917.*

Capt. A. S. HALSTEAD,
United States Naval Board of Appraisal,
26 Cortlandt Street, New York.

SIR: I received your communication of July 14 upon my arrival in the city to-day; hence the delay in reply to the same.

Under date of July 13 I received a telegram from Hon. Josephus Daniels, Secretary of the Navy, as follows:

"The exigencies of the Navy in war demand the acquirement of your ship *Venetia*. Under the law I am sending

you notice to that effect. If you prefer to lease or tender it without this procedure, wire to-day and state your desires."

I would greatly prefer to lease the vessel during the term of the war, with the understanding that she would be restored to me in as good condition as when taken over by the Navy.

A short time ago I refused to consider an inquiry for the purchase of the yacht on the basis of $300,000. Her actual cost to me, including amount spent by me in alterations, additions, etc., is as follows:

Original cost unknown.	
Purchased by me	$125,000
Cost of converting from coal to oil fuel and general overhaul closely approximates	50,000
Customs duty on vessel	12,000
Wireless installation	2,600
Evaporators	2,000
Ice machine and refrigeration system	8,000
	199,600

I would be pleased to learn what amount, under reappraisal, would be considered by you a just compensation to be made for the vessel and her equipment, and whether in lieu of this I would have the option of dealing with you on a basis of a lease of the yacht, as suggested in the telegram from the Secretary of the Navy.

Very faithfully yours,

JOHN D. SPRECKELS.

July 27, 1917, the Secretary of the Navy sent the following telegram to decedent:

MR. JOHN D. SPRECKELS,
Yacht "Venetia," San Francisco, Calif.

Action suspended. Return *Venetia* San Francisco, August 2.

SECRETARY OF THE NAVY.

July 30, 1917, Captain Halstead wrote decedent as follows:

NEW YORK CITY, *July 30, 1917.*

J. D. SPRECKELS, ESQ.,
A. B. Spreckles Building,
60 California Street, San Francisco, Calif.

DEAR SIR: 1. Your letter dated July 24 in reference to the *Venetia* has been received, and in reply I would state that the matter of leasing or purchasing vessels rests with the

Secretary of the Navy and is not within the province of the functions of the board of appraisal.

2. The functions of this board are, when directed to do so by the Navy Department, to place an appraised value on vessels purchased or chartered by the Navy; also to report what will be a just compensation to owners in those cases where the vessels are required by the Navy.

3. Before a reappraisal of the *Venetia* can be made it will be necessary for the board to have before it vouchers, preferably in the form of receipted bills, covering the purchase price and expenditures listed in your letter of July 24. Also please furnish date of purchase by you.

4. For information as to whether you may lease the vessel to the Navy in lieu of accepting the "just compensation" it will be necessary for you to communicate with the Secretary of the Navy.

Very truly,

A. S. HALSTEAD,
Captain, United States Navy, Senior Member.

(10 a. m., September 6, 1917.)

On August 4, 1917, the decedent delivered the *Venetia* to the Navy authorities at Mare Island Navy Yard and the Navy authorities took possession of her.

August 22, 1917, Captain Halstead wrote decedent as follows:

NEW YORK CITY, *August 22, 1917.*

J. D. SPRECKLES, ESQ.,
A. B. Spreckles Building,
60 California Street, San Francisco, Calif.

DEAR SIR: Referring to my letters to you of July 14 and 30, relative to the steam yacht *Venetia*, I have to inform you that this board has set Thursday, September 6, 1917, at 10 a. m., as the time of the hearing in the case of the *Venetia*.

You are requested to have on hand at that time all vouchers necessary to substantiate statements of expenditures given in the evidence.

In case no evidence is presented at the time specified above, the board will proceed with the appraisal on the information and data already on hand.

Very truly,

A. S. HALSTEAD,
Captain, United States Navy, Senior Member.

August 30, 1917, decedent replied to Captain Halstead as follows:

Reporter's Statement of the Case

STEAM YACHT "VENETIA,"
San Francisco, Calif., August 30, 1917.

Capt. A. S. HALSTEAD,
United States Naval Board of Appraisal,
280 Broadway, New York City.

DEAR SIR: I beg to acknowledge receipt of your letter notifying me to appear personally on the 6th day of September, or submit vouchers in connection with the valuation to be placed on the steam yacht *Venetia.*

It is impossible for me to appear personally, so I am forwarding statement, supported by vouchers, of such expenditures as I would consider properly enter into the cost to me of the yacht.

These expenditures are picked out from a large file, and I do not feel that they cover the entire cost, but neither my engineer nor master are with me to check over numerous other items which might properly be added to the cost; however, this data will closely approximate the cost of the vessel to me.

I may say further that in addition to the amount of the statement inclosed, namely	$189,134.16
The cost of bringing the yacht from New York to San Francisco (her home port) amounted to	26,997.29
A total of	216,131.45

Kindly acknowledge the inclosure, which I trust will reach you safely.

I remain,

Very truly yours, JOHN D. SPRECKELS.

September 15, 1917, the Secretary of the Navy wrote the commandant twelfth naval district as follows:

SEPTEMBER 15, 1917.

From: Secretary of the Navy.
To: Commandant twelfth naval district.
Subject: Taking possession of ship *Venetia, S. P. 431.*
Reference: (a) Department's telegram 13504 of August 4, 1917.

1. If the *Venetia* was found in the same material condition when taken over as when inspected, you are authorized to pay to the owner, John D. Spreckels, upon satisfactory proofs of ownership and the execution by him and delivery to you of formal bill of sale of said vessel and her equipment, acknowledging the receipt in full of just compensation therefor, a sum of one hundred sixty-five thousand dollars ($165,000) and a further sum in payment for ordinary consumable stores.

2. The inspection report of this vessel should be on file at the navy yard.

3. Your attention is invited to the act entitled "An act making appropriations, to supply urgent deficiencies in appropriations for the Military and Naval Establishments, etc., approved June 15, 1917."

JOSEPHUS DANIELS.

September 15, 1917, the Secretary of the Navy wrote decedent as follows:

SEPTEMBER 15, 1917.

SIR: You are informed that the President has determined a just compensation for the acquisition of the *Venetia, S. P. 431*, to be one hundred sixty-five thousand dollars ($165,000).

The commandant, twelfth naval district, has been ordered to pay you the sum of one hundred sixty-five thousand dollars ($165,000) upon proof of ownership, if the condition of the *Venetia* was the same as when inspected and upon the execution by you and delivery to him of formal bill of sale of said vessel and her equipment.

The commandant is also authorized to pay you a further sum equal to the value of ordinary consumable stores on board at time of delivery.

Very respectfully,

JOSEPHUS DANIELS,
Secretary of the Navy.

MR. JOHN D. SPRECKELS,
60 California Street, San Francisco, Calif.

September 22, 1917, decedent wrote the Secretary of the Navy as follows:

SAN DIEGO, CALIF., *September 22, 1917.*

DEAR SIR: I am in receipt of a communication from the Navy Department this day informing me that the President has determined a just compensation for the acquisition of the *Venetia* to be one hundred and sixty-five thousand dollars ($165,000). It is inconceivable upon what basis this sum was arrived at. Surely very few of the facts were taken into consideration in fixing the amount. As a matter of fact, within the last six months I have been offered three hundred thousand dollars ($300,000) for the yacht, and I refused the offer. I obtained the yacht only after a long search for a vessel that suited me, and I have no desire to part with it.

In answer to a personal telegram from you requesting me to determine whether I would sell or lease the yacht to the Government, I elected to lease the vessel for the duration of the war, and I assumed upon my acceptance of your offer to lease the yacht, the Government would charter the ship.

Will you please inform me what monthly remuneration I may expect for the charter of this ship?

Very respectfully,

JOHN D. SPRECKELS.

Hon. JOSEPHUS DANIELS,
Secretary of the Navy, Washington, D. C.

October 20, 1917, the Secretary of the Navy wrote the commandant twelfth naval district as follows:

OCTOBER 20, 1917.

From: Secretary of the Navy.
To: Commandant twelfth naval district.
Subject: Taking possession of yacht *Venetia, S. P. 431.*
Reference: (a) Navy Department's letter 28806–11:14 Op–14–G–Ca 9/12 of September 15, 1917.

1. Reference (a) is hereby modified as follows:
2. You will take possession of the *Venetia*, owner John D. Spreckels, giving to the owner, or his representative, a receipt for the yacht.
3. You are authorized to pay the owner, John D. Spreckels, upon satisfactory proofs of ownership, a sum of two thousand dollars ($2,000) per month for charter money, and in case of loss while in the Government service a sum of one hundred and sixty-five thousand dollars ($165,000).
4. The inspection report of this vessel should be on file at the navy yard.
5. Your attention is invited to the act entitled, "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments, etc., approved June 15, 1917."

JOSEPHUS DANIELS.

October 20, 1917, the Secretary of the Navy, wrote decedent as follows:

OCTOBER 20, 1917.

SIR: You are informed that the President has determined a just compensation for the acquisition by charter of the *Venetia, S. P. 431*, to be two thousand dollars ($2,000) per month for charter money, and in case of loss while in the Government service a sum of one hundred and sixty-five thousand ($165,000).

You will deliver the *Venetia* to the commandant twelfth naval district at her present location.

The commandant twelfth naval district has been ordered to pay you the sum of two thousand dollars ($2,000) per month charter money and in the case of loss while in the Government service a sum of one hundred and sixty-five

thousand dollars ($165,000) upon proof of ownership, should the condition of the *Venetia* be the same as when inspected.

Very respectfully,

JOSEPHUS DANIELS,
Secretary of the Navy.

JOHN D. SPRECKELS,
60 California Street, San Francisco, Calif.

III. The *Venetia* was a steam yacht, built in 1903. Her principal dimensions were: Length, 226 feet over all; length on water line, 196 feet; beam, 27 feet; depth, 17 feet; gross tonnage, 558; net, 229. Her average speed ranged from 10½ to 11¾ knots per hour. She was equipped with one three-cylinder triple-expansion engine of about 880 horsepower and Scotch two-furnace boilers. The vessel, while in New York Harbor, was purchased by decedent in 1910 for $125,000, and was thereupon taken through the West Indian Islands and the Strait of Magellan to San Diego, Calif., where she arrived March 5, 1911. In the early part of 1912 she was converted from a coal to an oil-burning vessel. Soon after her purchase by decedent, her refrigerating plant was replaced by a new one and other repairs were made.

About one month before the Government took possession of her she was dry-docked at the plant of the Bethlehem Shipbuilding Corporation and overhauled. She was then surveyed by Lloyd's agents and given A–1 classification. Thereafter and before the Government took possession of her she made two round trips between San Francisco and San Diego. She had never been used for any purpose other than yachting. She was turned over to the Government in substantially the same condition as when last surveyed.

On August 4, 1917, when she was delivered by decedent to the commandant, twelfth naval district, at the Mare Island Navy Yard, Calif., there were in the vessel the engine, boilers, tubes, condensers, electric-light plant, pumps, lead bilge pipes, and some other equipment and auxiliaries which had been placed therein at the time of her construction.

The Navy Department proceeded to make such alterations as would in its judgment properly equip her for use in the

Navy. They found that certain parts needed repairing and that other minor parts were missing. They found her machinery was in general in fairly good condition, some repairs and renewals being necessary. They made many important additions and structural changes in preparing the vessel for use in the Navy, such as gun mounts and platforms, magazine chambers, conversion of saloon rooms into crew's quarters, longer and heavier pilot house, new ice box, different davits, iron in place of wooden hatches.

In the work of repairing and preparing said vessel for Navy service such equipment as was not needed was removed, boxed and crated, and stored for return to the decedent.

The repairs and alterations were begun August 4, 1917, and were concluded the latter part of October, 1917, when the ship went to the League Island Navy Yard at Philadelphia, where recalking of decks and other repairs were continued. Thence she proceeded to the Brooklyn Navy Yard, where other work was done upon her. She returned to the League Island Navy Yard and was then put into service, her base being Gibraltar, her employment to convoy merchantmen through the Mediterranean Sea. On her outward trip in the middle of January she encountered several northwest storms from Bermuda to the Azores. On this trip she towed a French submarine chaser, and during the storm suffered a heavy strain, as a result of which the deck seams opened up and she leaked. She also had a collision in the Mediterranean Sea. She was placed in dry dock at least twice at Gibraltar for repairs or renewals.

IV. In March, 1919, the *Venetia* was taken to the Mare Island Navy Yard and without alteration was tendered to the decedent. The decedent refused to accept the vessel. A naval board of appraisal, duly appointed, determined the cost of restoring the vessel to the same condition and good order as when taken over, including the cost of replacing articles on board at the time the vessel was taken over and not on board when the vessel was returned, to be $76,331.83, and this amount was approved by the Secretary of the Navy.

Reporter's Statement of the Case

March 28, 1919, the Acting Secretary of the Navy wrote the commandant, twelfth naval district, as follows:

MARCH 28, 1919.

From: The Acting Secretary of the Navy.
To: The commandant, twelfth naval district.
Subject: U. S. S. *Venetia, S. P. 431*, return to owner.

1. The commandant of the twelfth naval district is directed to return the above-named vessel to her owner.

2. The commandant, twelfth naval district, is authorized to pay to the owner of the above-named vessel (John D. Spreckels, 60 California Street, San Francisco, Calif.) the sum of $76,331.83, this amount having been determined by the board of review and approved by the Secretary of the Navy, as the cost of restoring the vessel to the same condition and good order as when taken over, including the cost of replacing articles on board at the time the vessel was taken over and not on board when the vessel was returned.

3. The commandant is directed to pay to the owner of the above-named vessel the amount of charter hire, up to the time she was offered to her owner, taking a receipt therefor.

4. If possible, a release will be procured from the owner of this vessel at the time payment of the award is made, releasing the Government from any and all claims which the owner might have, by reason of the leasing or use of her by the United States. In case the owner refuses to sign a release, this vessel should be tendered to him under Form "Sol–D" and the vessel, if the owner will then accept her, will be turned over to him upon his giving a plain receipt therefor.

5. In case the owner refuses to accept the amount as stated in paragraph 2 herein, he should be notified of his legal rights in the matter, i. e., to accept 75 per cent of the above amount and sue in the Court of Claims for such sum as added to the above-mentioned 75 per cent shall be just compensation due him on account of the taking over and use of this vessel in accordance with the Secretary of the Navy's order No. 28905–11:14 of October 20, 1917.

VICTOR BLUE.

V. Thereafter, ending September 20, 1919, there were negotiations between the decedent and the Navy Department for the return of the yacht. Tenders were made to decedent at various times by the Navy Department of the yacht *Venetia* and the said sum of $76,331.83, mentioned in letter of the Acting Secretary of the Navy dated March 28, 1919. (Finding IV.)

The decedent refused to accept the tenders as inadequate and finally on September 20, 1919, addressed the commandant, twelfth naval district, as follows:

"I have concluded to accept the proposition made me by the United States Government to pay me 75 per cent of the amount of $76,331.83 in payment of the award heretofore made by the board of review sitting in New York, in allowance of a portion of the estimated cost of reconstruction of the yacht *Venetia*, commandeered for service in the war with Germany, which amount has been, and is now, protested by me, and accepted only with the understanding and agreement that all disputes respecting the amount so allowed shall be renewed for consideration by the Court of Claims, and without prejudice to my full right to make such claims and representations before the Court of Claims, or any other body having authority to determine the same, of all additional allowances and payments due me.

"As you know, it has always been, and is now, my claim, which I am able to establish through competent proof, that the allowance made by the Government is inadequate to compensate me for the loss sustained, to place the yacht in condition she was in when taken over by the Government, and my acceptance of the amount to be paid must not be considered as a waiver of my claim to additional allowance and compensation therefor."

VI. The United States Government used the *Venetia* in its service until some time in April, 1919. From August 4, 1917, to April 7, 1919, the decedent was paid by the defendant $2,000 per month as charter money, referred to in the letter of the Secretary of the Navy to decedent dated October 20, 1917. (Finding II.)

On September 25, 1919, the yacht was delivered into the possession of decedent, the receipt of which he acknowledged on that date "subject to inventory." Decedent was paid by the defendant the sum of $57,248.87, being 75 per cent of the total award of $76,331.83 made by the board of appraisal.

VII. The decedent proceeded to have repairs and work done on the said yacht in order to restore it to the condition it was in when delivered to the Government. He had a survey made by a competent marine surveyor and consulting engineer, and upon this survey bids were made for the work. The work was given to the successful bidders and the yacht

was restored by them to the condition it was in when delivered to the Government and in addition thereto certain improvements were made.

The reasonable cost of reconditioning, exclusive of said improvements and not exceeding that which decedent actually expended, and the reasonable compensation for the loss of the use of the yacht from the date of the last rental payment until the time when, by due diligence, the reconditioning could have been accomplished, exclusive of the period of negotiations, amounted to $98,331.83, less the $57,248.87 already paid said Spreckels, or $41,082.96.

The court decided that plaintiffs were entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

On August 4, 1917, the Government took possession of the yacht *Venetia*, owned by plaintiffs' decedent, John D. Spreckels. It was delivered to the proper Navy authorities on that date at the Mare Island Navy Yard.

The vessel was acquired under the provisions of the act of June 15, 1917, which authorized the President, by the terms of subdivision (e) of said act, "to purchase, requisition, or take over the title to, or the possession of, for use, or operation by the United States, any ship now constructed, or in the process of construction, or hereafter constructed, or any part thereof, or charter of any ship."

It appears, however, from certain correspondence between said Spreckels and the representatives of the Government that it was first the intention of the Secretary of the Navy to purchase his yacht outright, to which proposal decedent objected, expressing instead his preference for a suitable rental or hire for its use by the Government. This correspondence continued from a period prior to August 4, 1917, to October 20, 1917, on which date the Secretary of the Navy in a letter to decedent said: "You are informed that the President has determined a just compensation for the acquisition by charter of the *Venetia S P 431* to be two thousand dollars ($2,000) per month for charter money, and in case of loss while in the Government service a sum of one hundred and sixty-five thousand dollars ($165,000)."

The *Venetia* was used in the Government service under this arrangement from the time she was taken August 4, 1917, until April, 1919, and $2,000 per month was paid to said Spreckels during that period.

All of the equipment adapted to its use as a pleasure craft was removed and boxed, crated, and stored for return to decedent at the end of its use by the Government.

In preparing the vessel for Navy service important structural changes were made, including the installation of a longer and heavier pilot house, gun platforms, magazine chambers, and the mounting of one gun.

Some time in March, 1919, the vessel was brought to Mare Island and without change of condition was tendered to decedent, who declined to accept it. Negotiations for the adjustment of the differences between him and the Government were unsuccessful. The Government caused an appraisal by the authorized board of appraisal, which board estimated and allowed the sum of $76,331.83 as the cost of restoring the yacht to the same condition and good order as when taken over, including the cost of replacing articles on board at the time the vessel was taken over and not on board when it was returned; and on March 28, 1919, the Secretary of the Navy directed the commandant of the twelfth naval district to return the vessel to the said Spreckels and to pay to him the sum of $76,331.83. This offer was declined by him on the ground that the allowance made by the Government was inadequate.

On September 20, 1919, after continuing efforts to reach an agreement, said Spreckels accepted the Government's proposal to return the vessel and receive seventy-five per cent of the $76,331.83, reserving his right to assert his claim in this court for an amount which he might consider as just compensation.

Spreckels then proceeded to have the necessary repairs and work done for the purpose of restoring the vessel to its former condition as a pleasure yacht. This work was completed at an alleged cost of $173,815.27, exclusive of certain items alleged to be proper charges against the owner, and not a part of the cost of restoring the vessel to its original condition when taken over by the Government.

Opinion of the Court

Plaintiffs contend that the Government was under obligation to return the yacht in the same condition as when delivered to the Government, ordinary wear and tear excepted, and that they are also entitled to receive the $2,000 per month rental up to the time when such delivery was made.

This action is for the recovery of the difference between the amount received by said Spreckels on the award, being seventy-five per cent of said award and amounting to $57,248.87, and the amount claimed by plaintiffs as just compensation, $173,815.27, said difference amounting to $116,-566.40; and also rental at $2,000 per month from date of the last rental payment, April 7, 1919, until the completion of the work of restoration, July 20, 1920, amounting to $30,838.71, or a total recovery of $147,405.11.

Spreckels was under no obligation to accept the return of the yacht in its condition when tendered by the Government. He was entitled to its return in the same condition as it was when taken over; and the offer to return the vessel equipped for Navy service, and to pay decedent the estimated cost of restoring it to its former condition did not relieve the Government of its original duty to restore the vessel and return it to him fitted and equipped as a pleasure yacht.

In regard to the claim of plaintiffs for the cost of reconditioning, it seems practically impossible to separate the cost of actual restoration from the amount of expenditures by decedent, properly chargeable to betterment and general improvements.

Plaintiffs are entitled to reasonable compensation for the loss of the use of said yacht from April, 1919, the date of the last rental payment, until such time as the work of actual reconditioning could, by the exercise of due diligence, have been accomplished, excluding from consideration the period during which the negotiations for the adjustment of the differences between decedent and the Government were in progress.

We are of the opinion that plaintiffs should recover as a just and proper allowance for cost of actual reconditioning and just compensation for loss of the use of said yacht as above predicated, the sum of $98,331.83, subject to a credit of

$57,248.87 paid to said decedent on September 20, 1919, or a net sum of $41,082.96.

It is therefore adjudged that plaintiffs recover the sum of $41,082.96. It is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

CHARLES M. KINSOLVING v. THE UNITED STATES

[No. D-768. Decided February 14, 1927]

On the Proofs

Army pay; authority to assign junior officer to higher command while senior officer is present.—The authority to assign a junior Army officer in time of war or public danger to take command of an organization while a senior officer is present therein and available is in the President. Where such an assignment has been made without the authority of the President it is void and the junior officer is not entitled to the pay appertaining to the higher command.

The Reporter's statement of the case:

Mr. Cornelius H. Bull for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff claims the difference in pay between the grades of major and first lieutenant of the aviation section, Signal Corps, during the period from October 1, 1918, to January 19, 1919, while in command of the One hundred and sixty-third Aero Squadron in France.

II. Plaintiff, an American citizen, while serving as a sergeant in the French Army in France, did on about February 25, 1918, accept a commission as first lieutenant, aviation section, Signal Officers' Reserve Corps of the United States Army. Plaintiff was assigned to active duty February 26,

1918, and ordered to report to the commanding officer, headquarters fifth bombardment, per Special Orders, No. 57, headquarters American Expeditionary Forces, France, dated February 26, 1918.

III. Plaintiff reported to said fifth bombardment group and while serving therewith received Special Orders, No. 51, dated September 30, 1918, as follows:

SPECIAL ORDERS, NO. 51

[Extract]

HEADQUARTERS ASSISTANT CHIEF AIR SERVICE,
ZONE OF ADVANCE, AMERICAN EXPEDITIONARY FORCES,
France, September 30, 1918.

* * * * *

PAR. 1 The following-named officers are hereby relieved from duty with the 1101st Aero Replacement Squadron:

First Lieutenant Charles M. Kinsolving, A. S., U. S. A.

* * * * *

Under authority from the commanding general, Hqrs., S. O. S. (dated April 5, 1918), they will proceed from the First Air Depot (Meurthe et Moselle), to Deleuse (Meuse), reporting upon arrival to the commanding officer thereof, for assignment to duty with the 163d Aero Squadron; Lieut. Kinsolving as commanding officer and Lieut. Wilson as flight commander.

The travel directed is necessary in the military service.

* * * * *

By command of:

BRIG. GEN. FOULOIS,
GEORGE L. HYDE,
2nd Lieut., A. S., U. S. A., Adjutant.

Pursuant to said Special Orders, No. 51, plaintiff proceeded with the organization of the said One hundred and sixty-third Aero Squadron and assumed actual command of the same, commanding this unit from about September 30, 1918, until, to wit, January 19, 1919, on which date he was relieved.

Two officers on duty with the One hundred and sixty-third Aero Squadron during this period were senior in rank to plaintiff, and the plaintiff was not the senior officer on duty with the squadron when he assumed command.

Opinion of the Court

IV. From October 1, 1918, to January 19, 1919, the One hundred and sixty-third Aero Squadron operated against the enemy of the United States for the most part in reconnaissances. It was not the function of the kind of a squadron plaintiff commanded to wilfully engage in combat but to make reconnaissance. These reconnaissances were made along the fighting line on one side or the other, at some points over the enemy's line, but usually along the American line. And the squadron did not engage in active hostility with the enemy other than incursion from the ground of the enemy's antiaircraft fire. The squadron sometimes, but not often, fell under that fire. The squadron was on several occasions under orders to fly when possible to do so to assist the advance of the American or allied forces or to repulse the German advance. It was its function to do so when visibility permitted, and on some occasions it could not fly on account of the weather. The armistice was entered into on November 11, 1918, and thereafter there was no warfare between the United States forces and the enemy.

V. The tables of organization, United States Army, in effect between September 1, 1918, and January 30, 1919, designated an officer of the grade of major as the senior officer of an aero squadron.

VI. During all the time that plaintiff exercised the command of the One hundred and sixty-third Aero Squadron he was first lieutenant in the United States Army and was paid as such. The difference in pay and allowances between a first lieutenant and a major during the period October 1, 1918, to January 19, 1919, is $723.34.

The court decided that plaintiff was not entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

This is a suit in which the plaintiff claims the difference in pay between the grades of major and first lieutenant of the aviation section, Signal Corps, during the period from October 1, 1918, to January 19, 1919, while in command of

the One hundred and sixty-third Aero Squadron in France. The amount claimed is the sum of $723.34.

The facts in this case are fully set forth in the findings. The fact to which especial attention must be paid is that when the plaintiff was ordered to take command of the One hundred and sixty-third Aero Squadron by the Assistant Chief of Air Service in France there were serving with the said squadron two officers senior in rank to the plaintiff and who were available for duty.

The plaintiff claims under section 6 of the act of April 26, 1898, which reads as follows:

"That in time of war, every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised." * * *

That the plaintiff exercised a command above that pertaining to his rank is not questioned. But the Government contends that he did not exercise such command "under assignment in orders issued by competent authority." It is pointed out by the Government that the only authority of law for assigning a junior officer of an Army organization to take command of such organization in time of war or public danger while his senior officer is present and available for duty is by order or authority of the President, and the one hundred and nineteenth article of war is cited to maintain that contention. That article reads as follows:

"*Rank and Precedence Among Regulars, Militia, and Volunteers.*—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or

called into service of the United States; and third, officers of the volunteer forces." (39 Stat. 670.)

It is not asserted that the President had given authority to the Assistant Chief of Air Service in France to exercise the authority conferred upon the President by the aforesaid article of war. In the face of the express language of the statute we can not hold that the plaintiff was exercising his command under orders issued by competent authority. That he rendered the service, that he was bound to obey his commanding officer, and would have been court-martialed if he had not done so, may be conceded. But these facts do not cure the inherent weakness of the plaintiff's case; for an illegal or void order can not be made the basis of a claim for increase of pay for exercising higher command as provided for in the act of April 26, 1898. (30 Stat. 365; 26 Comp. Dec. 691.)

The petition of the plaintiff must be dismissed. It is so ordered.

Moss, *Judge;* Graham, *Judge;* Booth, *Judge;* and Campbell, *Chief Justice*, concur.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO. v. THE UNITED STATES[1]

[No. C-28. Decided February 14, 1927]

On the Proofs

Railroad transportation; accounting with Railroad Administration; collection from participating carriers.—Where plaintiff has been paid for Government transportation the amount sued for, thereafter said amount has been collected by the United States Railroad Administration from other carriers participating in the movement, no charge has been raised by the Railroad Administration against the plaintiff or any collection made, and there is no evidence of any demand by the said participating carriers upon the plaintiff or settlement between them, the plaintiff is not entitled to recover.

[1] Writ of certiorari denied.

The Reporter's statement of the case:

Mr. Lawrence H. Cake for the plaintiff. *Britton & Gray* were on the brief.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, a corporation, is a common carrier by railroad of freight and passengers.

II. Before and at the time of the transportation hereinafter mentioned the common carriers of the United States generally, including the plaintiff, severally agreed with the Quartermaster General of the United States Army that they would accept for the transportation of Government troops and property the amounts that would be payable by the Government, calculated by way of the cheapest route between the same terminal points, via a usually traveled route for military traffic, from a lawful rate filed with the Interstate Commerce Commission as applying from point of origin to destination via such route at time of movement.

III. During the period beginning April 6, 1917, and ending October 5, 1917, inclusive, the plaintiff participated in various movements of freight and passengers for the United States Government, upon Government bills of lading and transportation requests, for which transportation the plaintiff, as the final carrier of freight and the initial carrier of passengers, rendered bills and received payment through the accounting and disbursing officers of the Government, in accordance with the terms of the said equalization agreements above mentioned. A part of the land-grant deductions taken into account in determining the amount due in each instance were made on the basis of a calculation of land-grant deductions and adjustments by way of certain portions of the Missouri Pacific system, over which land-grant deductions of 100 per cent were proper under the granting act of July 28, 1866, chapter 300. Statements of the items and details of such transportation are annexed to plaintiff's original and amended petitions as Exhibits A and B and made a part hereof by reference.

IV. April 6, 1917, the Congress of the United States, by joint resolution, declared the existence of a state of war between the United States and the Imperial German Government.

V. October 6, 1917, the Congress enacted, as a part of the act approved October 6, 1917, chapter 79 (40 Stat. 361), the following:

"Land-grant railroads organized under the act of July 28, 1866, chapter 300, shall receive the same compensation for transportation during the existing war emergency of property and troops of the United States as may be paid to land-grant railroads, organized under the land-grant act of March 3, 1863, and the act of July 27, 1866, chapter 278, for such transportation during said emergency: Provided, That this paragraph shall not be construed as changing in any other way or for any other period of time the rights and duties of the land-grant railroads first above mentioned."

VI. On transportation requests WQ—43853, 554751, 35368, 258075, 717725, 591607, 553863, 553861, listed in Exhibit A to the petition (omitting transportation request WQ—258072), the difference between the amount paid on the 100 per cent land-grant basis as stated in Finding III, *supra*, and the amount which would have been paid on the basis of a 50 per cent land-grant deduction, on account of the equalization with the Missouri Pacific, is $3,453.83. That difference has not been paid, through the accounting or disbursing officers of the Government, to the plaintiff or any of the other carriers participating in the movements.

VII. On the bills of lading listed in Exhibit B to the petition, the difference between the amount paid the plaintiff on the 100 per cent land-grant basis, as stated in Finding III, *supra*, and the amount to which it would have been entitled on the basis of a 50 per cent land-grant deduction, on account of the equalization with the Missouri Pacific, is $480.26, which has not been paid, through the accounting or disbursing officers of the Government, to the plaintiff or any of the other participating carriers.

VIII. On transportation request WQ—258072, the plaintiff billed and was paid by the disbursing officer $10,636.50, being 525 men at a fare of $20.26 per capita. This exceeded a fare of $16.00 calculated by way of the said Mis-

souri Pacific system, with deductions of 100 per cent proper under the granting act, and which plaintiff, under the equalization agreement, had agreed to accept. Accordingly thereafter the Auditor for the War Department deducted the sum of $2,236.50 from bills of the United States Railroad Administration for transportation rendered the Government during Federal control, to meet the overpayment, being the difference between the fares of $20.26 and $16.00 for 525 men.

The United States Railroad Administration thereupon collected the said sum of $2,236.50 in March, 1919, from carriers participating in the movement, and as follows:

From St. Louis & San Francisco Ry. Co	$1,223.25
From St. Louis, San Francisco & Texas Ry. Co	299.25
From International & Great Northern Ry. Co	640.50
From Galveston, Harrisburg & San Antonio R. R. Co	73.50
	2,236.50

making no collection from the plaintiff and charging it in no way. There is no evidence in the case of payment by plaintiff to these carriers or of any settlement between the plaintiff and the said participating carriers.

The correct net fare on the basis of 50 instead of 100 per cent land-grant deduction is $20.22, and the difference between said fare and $16.00, for 525 men, is $2,215.50.

The court decided that plaintiff was entitled to recover $3,913.09.

Campbell, *Chief Justice*, delivered the opinion of the court:

There are three items involved in the claim in this case, and as to two of them, $3,453.83 and $480.26, with a deduction to be noted, the plaintiff is clearly entitled to recover. These two items represent the difference between 100 per cent land-grant deduction over part of the route and the 50 per cent land-grant deduction which was applicable under the act of October 6, 1917 (40 Stat. 361). This difference has not been paid. The third item, amounting to $2,215.50, presents a different question. The petition alleges that the

amount claimed in the three items " has not been paid " to plaintiff. The stipulation shows that plaintiff presented its bill for $10,636.50 and was paid the full amount. The correct amount on the basis of 50 per cent land-grant deduction was $10,615.50, or $21.00 less than was actually paid to and received by plaintiff. The Auditor for the War Department reduced the per capita fares and thereby reduced the bill by $2,236.50. This sum was then deducted from accounts due the United States Railroad Administration for transportation rendered during Federal control.

The matter then stood as follows: Plaintiff had been paid in full, including the item of $2,236.50. The auditor had deducted this amount from the Railroad Administration bills. The Railroad Administration made no collection from plaintiff and made no charge against plaintiff. It collected from or charged the sum deducted by the auditor to four other carriers, in varying amounts, who participated in the movement in question. It does not appear from the evidence that plaintiff paid the participating carriers any part of the sum it received from the disbursing officer, which amount, as already said, was the entire bill. Nor does it appear that these " participating carriers " have made any demand on plaintiff. For aught that appears in evidence the plaintiff is still in possession of the sum paid to it upon the rendition of its original bill, which sum includes the land-grant based upon 50 per cent and not 100 per cent. In this condition of the record plaintiff is not entitled to recover the item of $2,215.50.

It is established by the decisions of the Supreme Court and of this court that where a railroad company has been paid its bills, and upon the theory that the payments were excessive, deductions to cover the excess have been made by the accounting officers from accounts due the Railroad Administration during Federal control, the railroad company can sue and recover for these improper deductions after it has accounted to the Railroad Administration in settlement. See *Reading Company et al. case*, 270 U. S. 320, 60 C. Cls. 131. But the instant case is not brought within the principle of these decided cases. As already

stated, plaintiff has been paid, and to allow a recovery upon the present record would amount to a double payment. This question was settled by this court in *Southern Pacific Co. case*, No. 34717, decided December 6, 1926, 62 C. Cls. 649. Commenting on the facts developed in that case, we said:

"For some unexplained reason, this sum * * * was charged on the books of the Railroad Administration to two other companies, one of these items to each. Without showing that it has accounted for them to the Railroad Administration the plaintiff can not recover the amount. Its bill was paid originally in full, and if the Railroad Administration has not required reïmbursement on account of the deductions it is plain that plaintiff has not lost anything. To the extent it has made such reimbursement or accounting it is entitled to recover."

We are now asked to go even further than the plaintiff asked in the *Southern Pacific Co. case*. The court can not revise the settlements between the terminal or the initial carrier on the one hand and its connecting or participating carriers on the other hand so far as their relative rights are concerned, but it can and should say to a plaintiff that it may not receive the entire amount of its bill with proper land-grant deductions and while still holding the amount so received sue to recover a charge made by the Railroad Administration against several participating carriers. We have, therefore, not only a failure of proof upon the only phase presented by the petition, which is that the plaintiff is suing for land-grant deductions allowed by the act of October 6, 1917 (see *Baird Case*, 131 U. S., "Appendix" CVI; 8 C. Cls. 13), but also there is a failure of proof of any accounting by plaintiff to either the Railroad Administration or its connecting carriers for the amount of $2,236.50 received by it.

The plaintiff is entitled to recover the two items first above mentioned, less $21.00 overpaid to it on the third item. As to the amount claimed on the third item, $2,215.50, the petition should be dismissed. And it is so ordered.

Moss, *Judge;* Graham, *Judge;* Hay, *Judge;* and Booth, *Judge*, concur.

Opinion of the Court

WALTER E. CARLTON v. THE UNITED STATES

[No. C–376. Decided February 14, 1927]

On the Proofs

Navy pay; student aviator.—Where an order designating plaintiff, who holds a temporary commission of warrant officer, as a "naval aviator" for duty involving actual flying is revoked by an order which designates him thereafter as a "student naval aviator" involving actual flying, with the same duties, and the authorized quota of naval aviators is full, he is not entitled during the period of his designation as a student aviator to the increase in pay provided for naval aviators.

The Reporter's statement of the case:

Mr. Cornelius H. Bull for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The facts are reviewed in the opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This case was referred to a commissioner of the court for a report of the facts. He has made his report, and neither party has excepted to it. It appears that the plaintiff was designated in March, 1918, a student naval aviator for duty involving actual flying in aircraft. He was recommended for detail as naval aviator, but this detail was not approved because the officer had "never received advanced training" at Pensacola seaplane school. He was then recommended for training at Pensacola to qualify him for duty as a naval aviator and was on January 30, 1919, designated a naval aviator for duty involving actual flying in aircraft, and this designation was approved by the Bureau of Navigation, Navy Department. Plaintiff continued to serve as naval aviator until February 21, 1921, when the Bureau of Navigation sent to him an order to the effect that his "designation as a naval aviator involving actual flying in aircraft is

hereby revoked, effective on the 28th day of February, 1921," and "2. You are hereby designated a student naval aviator involving actual flying in aircraft from 28th of February, 1921," to continue in force "until specifically revoked." During the period from February, 1921, to December 31, 1921, involved in this suit plaintiff's duties were substantially what they had been as naval aviator before his last designation as a student naval aviator. He was paid an increase of 35 per cent of his pay but claims that he should have been paid the increase of a naval aviator, that is, 50 per cent. We can not say that the designation of plaintiff as a naval aviator could not be revoked. The brief in his interest correctly states that the "appointment" as a naval aviator was not an appointment to office but was "a designation to duty." The statute places a limitation on the number of officers who may be detailed for duty involving actual flying. (Act of March 3, 1915, 38 Stat. 939; act of August 29, 1916, 39 Stat. 582.) There is a distinction between a student naval aviator and a naval aviator. The history of plaintiff's designation, as well as the statute, makes this plain, and the "designation to duty" made at one time was clearly revocable. The reason assigned for it in plaintiff's case was because of the legal limitations of the number of officers who could be detailed as naval aviators and the department desired to designate certain other officers whose retention in the naval service as officers was certain. Plaintiff's temporary commission as a commissioned warrant officer was revoked December 31, 1921. Apparently foreseeing this fact, it was deemed proper to designate as naval aviator an officer whose retention was certain. But whatever the reason for the change in designation, it was made and the court can not say that plaintiff after his designation as a student naval aviator remained or was in fact or law a naval aviator entitled to the increased pay now claimed. The quota of naval aviators was full, and the court is unauthorized to add to it.

The petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

Reporter's Statement of the Case

HARRY B. LYNCH v. THE UNITED STATES

[No. C–1065. Decided February 14, 1927]

On the Proofs

Navy pay; aviation duty; flights required by current regulations.—Where an aviation chief machinist's mate of the Navy, regularly detailed to duty involving flying, makes the number of flights required by Executive order administering the act of Congress granting increase of pay to officers, warrant officers, and enlisted men detailed to duty involving flying, and in accordance with the prevailing customary method of compliance with the regulations, he is entitled to the statutory increase in pay and can not be deprived of the same because his flights were not in accordance with regulations issued thereafter.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Cornelius H. Bull* and *King & King* were on the briefs.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Harry B. Lynch, was, during the period covered by this claim, an aviation chief machinist's mate on duty at the naval air station, Pensacola, Fla. An aviation chief machinist's mate is a petty officer of the Navy, a machinist fitted by special qualifications and training for aviation duty.

The following order was issued by the commanding officer at the United States Naval Air Station, Pensacola, Fla., January 1, 1921:

"From: Commanding Officer.
"To: Bureau of Navigation.
"Subject: Aviation Designation of Lynch, Harry Burr, Cmm. (A), U. S. Navy (438–20–17).

"1. I have this day detailed the above-named man for duty involving actual flying in aircraft, including dirigibles and airplanes, in accordance with the acts of Congress approved March 3, 1915, and August 29, 1916.

"Approval of this detail is requested.

"2. Enlistment expires April 22, 1923.

"G. F. BROWN, *Acting.*"

On which was indorsed the following:

"From: Secretary of the Navy.
"To: Bureau of Navigation.

"1. Approved.

"From: Bureau of Navigation.
"To: Commanding Officer, Naval Air Station, Pensacola, Fla.

"1. Returned approved.

"2. In case of discharge or revocation of appointment, the bureau will be immediately notified, and special report will be made to bureau when man is transferred.

"E. D. LUNDBERG.
"By direction. Q."

II. July 1, 1922, the President of the United States promulgated regulations in execution of the provisions of section 20 of the act of June 10, 1922, 42 Stat. 632, 633, the material portion of which is as follows:

"9. Each officer, warrant officer, or enlisted man of the Army, Navy, Marine Corps, or Coast Guard, who is detailed to duty involving flying shall be required to make at least ten flights or be in the air a total of four hours during each calendar month; provided that an officer, warrant officer, or enlisted man so detailed who is unable to meet these requirements during any calendar month for any reason other than sickness or injury shall be regarded as having met them if he performs a minimum of twenty flights or is in the air a minimum of eight hours prior to the end of the following calendar month; provided further, that an officer, warrant officer, or enlisted man so detailed, who is unable to meet this alternative requirement for any reason other than sickness or injury, shall be regarded as having met the requirements if he performs a minimum of thirty flights or is in the air a minimum of twelve hours prior to the end of the calendar month thereto succeeding. Failure to comply with the foregoing requirements shall have the effect of suspending the detail to duty involving flying, but only for the period during which the foregoing requirements as to flights are not complied with; * * *."

III. Following this Executive order of July 1, 1922, there was issued a station notice at the United States Naval Air Station, Pensacola, Fla., under date of July 25, 1922, the material part of which is as follows:

Reporter's Statement of the Case

"STATION NOTICE

"U. S. NAVAL AIR STATION,
"*Pensacola, Florida, 25 July, 1922.*

"The following is published for the information and guidance of all concerned:

"The following shall be known as Section 'F' of the instructions for carrying into effect the joint service pay bill, act of 10 June, 1922.

* * * * *

"2. (a) The Executive order * * * embodying the regulations required by section 20 of the act * * * has as its underlying principles:

"(a) That an officer, warrant officer, or enlisted man, assigned to duty in the aeronautic organization of the Navy, or whose duty includes flights in aircraft, must be detailed to duty involving flying.

"(b) That he must fly to be entitled to pay.

* * * * *

"(d) Relative to (b) '*That an officer, warrant officer, or enlisted man must fly to be entitled to pay.*' It is evident that Congress intended the increased pay for flying as a compensation for the risk incurred by reason of flying, and therefore a minimum amount of flying is required to entitle a person, within his detail to duty involving flying, to the increase in pay and this minimum is the same for all personnel.

* * * * *

"3. (b) Existing orders, designations, or appointments, and details to duty involving flying shall remain in effect after 1 July, 1922, until superseded by further assignments, designations, or appointments, *but the flights requirements prescribed by paragraph 9* [Executive order of July 1, 1922, *supra*] *are effective from 1 July, 1922.*

"4. (a) Details to duty involving flying continue in effect during the entire period of assignment to duty with any part of the aeronautic organization of the Navy in the case of student and qualified personnel and for the period of duty including flights in aircraft in the case of others. The date of detail to duty involving flying, and the date of termination of it, mark the period during which flight pay may be credited; therefore if the flight requirements (par. 9) are met for the month in which the detail is made, flight pay is due from the *date of detail to the end of that month.* Similarly, if the flight requirements are met up to and including the month

in which the detail is terminated flight pay is due from the first of such month *to and including the date of termination* of the detail.

"5. (a) Paragraph 9 makes obligatory a minimum amount of flying as follows:

"Ten (10) flights, or four (4) hours in the air in one calendar month; or

"Twenty (20) flights, or eight (8) hours in the air in two (2) consecutive calendar months; or

"Thirty (30) flights, or twelve (12) hours in the air in three (3) consecutive calendar months.

"The normal flight requirement is ten (10) flights, or four (4) hours in the air each calendar month, and, therefore, the alternative two or three months' period in which the flight requirements are permitted to be met must begin with the first month in which the flight requirements are not met. The following explanations and effects of suspension of detail to duty involving flying are all premised on this basis.

* * * * * * *

"6. (b) Commencing with 1 July, 1922, commanding officers of all naval aeronautic organization units will require that each officer, warrant officer, and enlisted man under his command who is detailed to duty involving flying, accurately maintain an 'Aviators' Flight Log Book.' In the column headed 'Flight Number' each actual flight will be entered, i. e., the interval between leaving the ground or water and again coming to rest will be counted as a flight and each such flight shall be entered separately with the date and duration, etc. At the end of each calendar month, or upon detachment of the officer or enlisted man concerned, the commanding officer shall bring the 'Aviators' Flight Log Book' of each individual into agreement with the Official Aircraft Log Books and will place the following certificate immediately after the last entry in each 'Aviators' Flight Log Book': 'I certify that the foregoing flight record is correct.' And he shall sign his name and rank."

IV. July 10, 1922, plaintiff made one flight occupying a period of one hour. July 26, 1922, plaintiff left the beach in a plane, left the water, flew in horizontal flight, descended, lit on the water, landed, took off, and repeated this ten times.

August 4, 1922, plaintiff was out for a period of one hour, leaving the beach, taking to the air, flying, landing, taking off again, and repeating the same as in the month of July,

ten times. August 16, 1922, one flight of 1 hour and 15 minutes.

September 12, 1922, plaintiff was out flying for 55 minutes, making nine hops of 5 minutes and one of 10 minutes. These flights were made like those of the two previous months, leaving the beach, taking the water, taking the air, and returning to rest upon the water, and repeating this ten times.

Concerning these flights the senior squadron commander at the Naval Air Station, Pensacola, Fla., reported to the commandant, January 31, 1924, as follows:

"From: Senior squadron commander.
"To: Commandant.
"Subject: In re paragraphs 1 to 4, inclusive, of attached correspondence in case of Lynch, H. B., A. C. M. M., U. S. N.

"1. During the month of July, 1922, the claimant made two flights, July 10th and July 26th, of one hour each. One flight was made August 4, 1922, of one hour; and one flight on August 16, 1922, of one hour fifteen minutes. One flight on September 12, 1922, of fifty-five minutes.

"2. These flights were revised as follows:

"The flight made July 26, 1922, was originally ten (10) flights; nine (9) of these flights for a duration of five (5) minutes each, and the tenth flight for a duration of fifteen (15) minutes. All these flights were combined and considered as one (1).

"The flight made on August 4, 1922, was originally composed of nine (9) five (5) minute flights and one (1) fifteen minute flight; these flights were combined to make one flight of one hour. There was no revision of flight made on September 12, 1922.

"3. It is not within jurisdiction of senior squadron commander to issue flight certificates; all flight certificates are issued and signed by the commandant of the station.

"4. It is believed that the commandant did not issue flight certificate for month of September, 1922, for the reason that claimant did not comply with orders issued by the Bureau of Navigation giving requirements of flights which entitled the claimant to extra compensation.

"W. MASEK."

And on this report Capt. H. H. Christy, United States Navy, indorsed to the Chief of Bureau of Navigation, Navy Department, Washington, D. C., March 6, 1924, the following:

"Subject: Harry Burr Lynch, A. C. M. M., U. S. N. (182–27–16) re information concerning flight pay of.

"1. Forwarded. The original flight certificates for July and August, 1922, were of the form that had been in use previously and stated that the person concerned had met the flight requirements of existing orders. Then, in the latter part of September, 1922, as I recall it, a new form of flight certificate was sent out by the Navy Department, much more in detail and far more exacting, which required the commanding officer to certify that each flight was for a specific official purpose. The instructions accompanying the new form of certificate required that the new certificates be issued for the preceding July and August, and the old one canceled. In order to carry out these instructions correctly a board of officers was ordered to investigate the character of all flights for July, August, and September.

"2. In issuing the new flight certificates I was guided by the findings of this board which carried out its duties in accordance with the spirit and letter of the new instructions. In almost all cases where new certificates were denied, the action was based on the fact that a flight was broken up into a series of short hops, whereas the purpose of the flight would have been accomplished equally well without the intervening landings, and it would naturally have been performed as one flight in order to accomplish the purpose desired.

"3. It will be noted that the instructions received in the latter part of September applies to the period beginning the preceding July 1st. It was this retroactive feature that complicated the situation and resulted in denying new flight certificates to a number of men who had met the requirements existing at the time the flights were made.

"H. H. CHRISTY."

Concerning plaintiff's service at the United States naval station, Pensacola, Fla., the commandant of said station reported to the Chief of Bureau of Navigation, Navy Department, October 25, 1923, as follows:

"STATEMENT OF SERVICES AND FLIGHT DUTY

"Subject: Lynch, Harry Burr; #182–27–16, A. C. M. M., U. S. N.

"Reference: (a) Bu. Nav. letter N–64–21, dated 18 October, 1923.

"Enclosure (A): Flights performed by Lynch, H. B., A. C. M. M., U. S. N.

"1. In accordance with reference 'a,' the following is submitted: Lynch, H. B., A. C. M. M., U. S. N., enlisted in the

U. S. Navy at Pensacola, Florida, on 23 April, 1919, and was given flight orders as of this date. On May 13, 1919, this man was transferred to Rio de Janiero, Brazil, for duty with the Brazilian mission, naval aviation. His flight orders on this station were revoked as of that date.

"2. On 30 December, 1920, Lynch reported at the naval air station, Pensacola, Florida, for duty. On January 1, 1921, Lynch was issued flight orders, which are still in effect.

"3. Previous to July 1, 1922, it was not the custom to keep flight log for enlisted men other than pilots. The inclosed flights were gleaned from the rough logs available at this station."

V. Plaintiff's account was credited with $126 flying pay for the period from July 1, 1922, to August 31, 1922, and the said amount was subsequently checked against his account in the second quarter of 1923. He was never paid or credited with flying pay for the month of September, 1922.

If the plaintiff is entitled to 50 per cent additional pay for flying during the period from July 1, 1922, to September 30, 1922, there would be due him the sum of $207.90 as per the following statement: 50 per cent additional pay as aviation chief machinist's mate at $138.60 per month from July 1, 1922, to September 30, 1922, 3 months at $69.30 per month.

The court decided that plaintiff was entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

The plaintiff, Harry B. Lynch, was, during the period involved in this action, an aviation chief machinist's mate on duty at the naval air station, Pensacola, Florida. An aviation chief machinist's mate is a machinist specially trained and qualified for aviation duty.

Prior to July 1, 1922, plaintiff was detailed for duty involving actual flying.

The act of Congress of June 4, 1920, 41 Stat. 768, provides as follows: "Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights; and hereafter no person shall receive additional pay for aviation duty except as prescribed in this section."

Opinion of the Court

By section 20 of the act of Congress of June 10, 1922, 42 Stat. 632, 633, the 50% increase in pay was extended to "all officers, warrant officers, and enlisted men of all branches of the Army, Navy, Marine Corps, and Coast Guard, when detailed to duty involving flying * * *."

Pursuant to the authority conferred by said act the President on July 1, 1922, promulgated regulations for the administration of said act, in which it is provided: "Each officer, warrant officer, or enlisted man of the Army, Navy, Marine Corps, or Coast Guard, who is detailed to duty involving flying, shall be required to make at least ten flights, or be in the air a total of four hours during each calendar month * * *."

In the months of July and August, 1922, plaintiff made flights in Government air craft, and there were issued to him certificates by the senior squadron commander approved by the commandant of the naval air station showing proper compliance with the established requirements, and was paid therefor 50% of his pay, which amounted to $69.30 per month, or a total for the two months of $138.60.

In the early part of the month of September plaintiff made certain flights, corresponding both in number and in character of performance with the service rendered in July and August. No certificate was issued for that month and plaintiff has had no pay for same.

In the latter part of September, 1922 (the date is not shown in record), new instructions were issued by the Navy Department more exacting in their requirements, under the terms of which, as construed by the Navy authorities, plaintiff was not entitled to receive flight certificates. Furthermore, the new instructions or regulations were made applicable to the period beginning July 1. At a subsequent date plaintiff was required to repay the amount theretofore received by him for the months of July and August. It is conclusively shown that for the period covered by plaintiff's claim his services met the requirements of the existing regulations.

In accomplishing these flights, which were routine test flights, the plaintiff left the beach in the plane, left the

water, flew in a horizontal flight, descended, alighting on the water, landed, took off and repeated the performance ten times. This was the customary method of compliance with the regulations in force from July 1, 1922, until the later regulations issued in the latter part of September, 1922, and the services of plaintiff in the performance of his flying duties were rendered in accordance with that method and accepted by the senior squadron commander and approved by the commandant of the naval air station as complying with the regulations.

It was the intention of Congress to provide extra pay for men detailed to flying service to compensate, in a measure, for the extra hazard of that service. The correctness of this principle was explicitly recognized by the following statement contained in what is called a station notice promulgated by the United States Naval Air Station at Pensacola, Florida, on July 25: "It is evident that Congress intended the increased pay for flying as a compensation for the risk incurred by reason of flying, and therefore a minimum amount of flying is required to entitle a person within his detail to duty involving flying, to the increase in pay, and this minimum is the same for all personnel." This notice was published for the information and instruction of all persons connected with flying operations at that station.

The court is of the opinion that the new instructions or requirements issued in the latter part of September, 1922, are invalid so far as they are made to relate to the service rendered by plaintiff under the orders and instructions existing at that time.

It is the judgment of the court that plaintiff recover herein the sum of $207.90. And it is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

Opinion of the Court

NEW YORK TRUST CO. v. THE UNITED STATES[1]

[No. E-499. Decided February 14, 1927]

On Demurrer to Petition

Income tax; exemption of New York corporation acting as executor, administrator, etc.—A corporation of the State of New York, authorized by the laws of that State to act as executor, administrator, etc., is not an officer, employee, or instrumentality of the government of that State, and is not exempt from payment of the Federal income tax on fees received by it as such executor, administrator, etc.

The Reporter's statement of the case:

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. William F. Unger, opposed. *Mr. Samuel P. Gilman* was on the brief.

The averments of the petition are stated in the opinion.

GRAHAM, *Judge*, delivered the opinion of the court:

This case comes on to be heard on a demurrer to the petition.

Plaintiff is a corporation organized and existing under and by virtue of the banking laws of the State of New York and, as such, is authorized by the laws of that State to act as administrator and executor of decedents' estates, guardian of minors and incompetents, testamentary trustee, and trustee under trusts created *inter vivos*.

During the year commencing January 1, 1918, plaintiff, acting under due appointment by the courts of the State of New York in the following capacities, received as its fees and compensation the sum of $51,317.81, covering the following items:

As executor of decedents' estates	$419.06
As administrator of decedents' estates	181.22
As committee of the property and person of insane people	4,003.06
As guardian for infants	405.96
As trustee under testamentary provisions	27,143.14
As trustee under voluntary trusts created *inter vivos*	19,165.37

[1] Writ of certiorari denied.

The plaintiff, pursuant to the requirements of the revenue act of 1918, 40 Stat. 1057, sections 232 and 233 in connection with section 213, filed its income-tax return and paid upon the said amount of $51,317.81, as income tax, $19,706.03.

On the 15th of March, 1924, plaintiff filed with the collector of internal revenue its claim for refund of $51,000, which claim, as amended May 20, 1924, was for $19,706.03. The Income Tax Bureau denied this claim, and, on appeal to the committee of appeals and review, the ruling was affirmed on January 24, 1925.

The plaintiff avers in its petition as follows:

"Upon information and belief, the claimant, acting in the capacities of administrator, executor, testamentary trustee, committee of incompetents, and guardian of infants, is an officer, agent, or instrumentality of the government of the State of New York in the performance of governmental functions, and that the Government of the United States is without power to tax income received by the claimant acting in these capacities and as such State officer, agent, or instrumentality."

It is conceded that if the said income arose in the shape of a compensation by reason of the fact that it was an officer or employee of the State of New York, its income, under the decisions of the courts, which are fully set out and discussed in the case of *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, would be exempt from the tax levied by the aforesaid act.

We are of opinion that plaintiff was not an officer or employee of the State of New York.

The court in the *Metcalf case* said:

"An office is a public station conferred by the appointment of Government. The term embraces the idea of tenure, duration, emolument, and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its terms, its duties, and its compensations * * *. The term 'officer' is one inseparably connected with an office; * * *"

See also *United States* v. *Hartwell*, 6 Wall. 385, 393, and *United States* v. *Germaine*, 99 U. S. 508, 511, 512, in which latter case it was held that the position must be "continuing and permanent, and not occasional or temporary." In the

Opinion of the Court

same case also the court mentions, as indicating that the plaintiff, Germaine, was not an officer, that he was "required to keep no place of business for the public use. * * * No regular appropriation is made to pay his compensation * * * but it is paid out of money appropriated for paying pensions in his district" and that there was "no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case."

In *Louisville, Evansville & St. Louis Railroad Co.* v. *Wilson*, 138 U. S. 501, 505, the court said:

"The terms 'officers' and 'employees,' both alike, refer to those in regular and continuous service. Within the ordinary acceptation of the terms one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service and exclude those employed for a special or single transaction."

But the plaintiff urges that if it is not an officer or employee it is an instrumentality of the government of the State of New York employed in carrying into effect some of the powers of government which could not be interfered with by taxation upon the part of the United States, and in effect that it is a constitutional means employed by the government of the State to execute its constitutional powers. We are of opinion that it is not such an instrumentality.

The plaintiff, while acting in the different capacities named in the petition, was discharging no function pertaining to the sovereign power of the State; it was not engaged in the civil service of the State. Its compensation was not paid by the State but indirectly by the private person or persons interested in the estate in each case, and it was accountable to them for a faithful discharge of its trust. It performed no duties which affected the welfare of the general public.

Plaintiff is claiming the benefit of an exemption from taxation, and the burden is upon it to show clearly that it is within the exemption claimed. *Phoenix Fire & Marine Insurance Co.* v. *Tennessee*, 161 U. S. 174; *Chicago, Burlington & Kansas City R. R.* v. *Guffey*, 120 U. S. 569, 575; and *Metcalf & Eddy* v. *Mitchell*, *supra*.

Reporter's Statement of the Case

The plaintiff has not clearly established that it is entitled to exemption from taxation under the statute.

The demurrer should be sustained and the petition dismissed, and it is so ordered.

Moss, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY CO. v. THE UNITED STATES

[No. C-711. Decided February 14, 1927]

On the Proofs

Res adjudicata; distinct causes of action.—Where plaintiff sues and is given judgment on several items of transportation included in a bill against the United States paid by a disbursing officer, other items in the said bill, representing other and distinct causes of action and requiring independent proof and relief, are not *res adjudicata*, although they might have been considered with the items on which judgment was rendered.

The Reporter's statement of the case:

Mr. Lawrence H. Cake for the plaintiff. *Britton & Gray* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Perry W. Howard* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, a corporation, is a common carrier by railroad.

II. Prior to January 1, 1917, the common carriers of the United States generally, including the plaintiff, severally agreed with the United States that they would accept for the transportation of Government troops and property the amounts that would be payable by the Government calculated by way of the cheapest route between the same terminal

Reporter's Statement of the Case

points as derived through deductions account land-grant distance, via a usually traveled route for military traffic, from a lawful rate filed with the Interstate Commerce Commission as applying from point of origin to destination via such route at time of movement.

III. Prior to January 1, 1917, plaintiff, with other carriers, entered into an agreement with the Government on the subject of fares and allowances for the transportation of military passenger traffic, the same being known as the interterritorial military arrangement, dated December 28, 1916, effective January 1, 1917.

IV. In January, 1917, the plaintiff and its connecting carriers transported for the United States on transportation requests 73502 and 73504, dated January 23, 1917, 832 soldiers from Mercedes, Texas, to Fort Snelling, Minnesota.

V. For the said service the plaintiff presented to a disbursing officer of the Army its bill No. 4028, in which it claimed $26,549.12 on the basis of a per capita fare of $31.91, computed in accordance with the said military arrangement.

VI. The disbursing officer refused to pay the bill as rendered, and after eliminating two men traveling as livestock attendants reduced the *per capita* fare claimed on account of transportation requests 73502 and 73504 to $29.80, making a total charge for the 830 men of $24,734. Through a clerical error the disbursing officer paid the plaintiff $25,078.00, making a difference of $1,407.30. The amount was included in disbursing officer's check #3542 dated November 23, 1917.

VII. Subsequently, on April 28, 1919, the accounting officers of the Treasury, in auditing the disbursing officer's accounts, made a further disallowance of $2,070.40 by applying a net *per capita* fare of $27.72, constructed by combining two party fares and an individual fare contrary to the provisions of the military arrangement.

VIII. This sum of $2,070.40 disallowed by the auditor was thereafter deducted from balances due the Railroad Administration during Federal control and was charged back by the Railroad Administration to the plaintiff. The plaintiff and the Railroad Administration had a final settlement, in which plaintiff accounted to the Railroad Administration for the amount of this deduction. The said bill

rendered by plaintiff, No. 4028, covered a number of transportation requests and two of these requests were included in the claim in case A-94 filed in this court on April 26, 1921, and for which plaintiff had judgment. Two of the requests involved in this suit were not included in the former suit. Requests involved in this suit are 73502 and 73504 for transportation from Mercedes, Texas, to Fort Snelling, Minnesota. The other two requests mentioned in the former suit were for transportation from a different point in Texas to Fort Snelling.

The court decided that plaintiff was entitled to recover, in part.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The claim here is for two items, one for $1,407.30 and the other for $2,070.40. The facts show that the transportation furnished by the plaintiff for which the claim of the first item is made was performed in January, 1917. The petition was filed June 6, 1923, more than six years after rendition of the service and the accrual of the plaintiff's right of action. *B. & O. Railroad Co. case*, 52 C. Cls. 468.

As to the other item of $2,070.40, the defendant contends that this amount was included in the claim for which petition was filed in 1921. It is a fact that the same plaintiff filed its suit No. A-94 for which it had judgment in a large amount, and in its petition it claimed for two items in bill No. 4028. But these two items were different from those involved in this suit, being for transportation from a different point from that mentioned in this suit. No reason is assigned for leaving these two requests out of the former suit, but they were omitted and they furnish distinct causes of action. These items would be barred by the statute of limitations of six years but for the fact that the deduction here complained of was not made until 1919, when the accounting officers in auditing the accounts of the disbursing officer made the deduction of $2,070.40 in addition to the earlier deduction. In such case the cause of action did not arise until the deduction was made in 1919.

Syllabus

The rule that a party is not at liberty to split up his demand and prosecute it by piecemeal does not require distinct causes of action—that is to say, distinct matters—each of which would authorize by itself independent relief, to be presented in the same suit though they may have existed at the same time and might have been considered together. *The Haytian Republic*, 154 U. S. 118, 125. The exhibit to plaintiff's petition in case A–94 shows that the two items of the bill which were claimed were for transportation from a named point in Texas, while the two items in the instant case are from a different point, namely, Mercedes. The evidence necessary to prove one of these causes of action would not establish the other. We think the plaintiff is entitled to recover for this item, having made settlement with the Railroad Administration on account of the deduction. See *St. Louis, Brownsville & Mexico Ry. Co. case*, 270 U. S. 320.

As to the other item the petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

JOHN D. CHAPMAN v. THE UNITED STATES[1]

[No. D–203. Decided February 14, 1927]

On the Proofs

Income tax; profit from sale of stock issued as dividend and representing increase of capitalization.—(1) Income resulting from the sale of stock issued as a stock dividend and representing an increase of capitalization, is not the receipt of dividend within the meaning of the income-tax laws, but is gain or profit derived from the sale of stock.

(2) Where the plaintiff has received as a dividend stock issued in connection with an increase of capitalization, and sells his original stock and the stock so issued, his taxable income, derived from the sale, is to be determined by taking as the cost per share of all the said stock an average obtained by treating the cost of the original purchase as the total cost of the original shares and those issued as dividend. See *Adelaide F. Chapman v. United States, post*, p. 424.

[1] Writ of certiorari denied.

The Reporter's statement of the case:

Mr. Sanford Robinson for the plaintiff.

Mr. Charles T. Hendler, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. J. Robert Anderson* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a resident of the town of Greenwich, county of Fairfield, State of Connecticut, and a citizen of the United States.

II. The Bethlehem Steel Corporation, organized under the laws of the State of New Jersey, on January 1, 1917, and until February 17, 1917, had an authorized common stock of a par value of $15,000,000, divided into 150,000 shares of the par value of $100 each, all of which was issued and outstanding. On or about January 23, 1917, the directors voted to increase the capitalization of the corporation, and in this connection declared a stock dividend of 200 per cent upon said common stock. The shares so issued as a stock dividend have no voting rights, but otherwise have the same rights as the original common stock. These shares are designated class B common stock, and they are hereinafter referred to as class B shares. The original common stock retained its voting rights and was designated and is hereinafter referred to as class A common stock. Afterwards, and on or about February 17, 1917, the Bethlehem Steel Corporation issued and delivered to stockholders 300,000 shares of said class B stock of the par value of $100 each, totaling $30,000,000, representing the said stock dividend. One hundred shares of said class B stock sold on a " when issued " basis on the New York Stock Exchange on February 17, 1917, at 120½ and another 100 shares sold on the same day at 121. The stock was first listed and traded in on the New York Stock Exchange on February 24, 1917. During the week February 24–March 2, 1917, 15,900 shares were bought and sold upon the New York Stock Exchange at prices ranging from 114½ to 103.

III. Throughout the year 1917 plaintiff owned 1,800 shares of said original common capital stock of the Bethlehem Steel Corporation, which was acquired during 1914 at

a cost of $48 per share, or $86,400. On or about February 17, 1917, plaintiff received from the Bethlehem Steel Corporation 3,600 shares of class B common stock of said corporation as his share of the 200 per cent stock dividend. Afterwards, before December 31, 1917, plaintiff sold all of said 3,600 shares of class B common stock so received as a stock dividend and received therefor $371,928.

IV. The net earnings of the Bethlehem Steel Corporation, according to the books of account, amounted to $27,320,736.86 for the calendar year 1917, and $43,593,968.16 for the calendar year 1916.

V. Plaintiff filed a Federal income-tax return for the calendar year 1917 with the collector of internal revenue at Hartford, Conn., on or about April 1, 1918, in accordance with an extension duly granted, and thereafter on or about June 15, 1918, paid Federal income taxes amounting to $23,756.35 reported to be due in said return to the said collector of internal revenue. The plaintiff reported said stock dividend in said return as a dividend.

VI. Thereafter and on or about March 14, 1923, the Commissioner of Internal Revenue made an assessment of additional income taxes against plaintiff for the calendar year 1917 amounting to $103,371.58. The plaintiff paid the additional tax so assessed to said collector of internal revenue on or about March 20, 1923, under protest. Thereafter and on or about March 26, 1923, plaintiff duly filed claim for refund of the full amount of additional taxes so paid, which claim for refund was rejected by the Commissioner of Internal Revenue on or about September 15, 1923.

Said assessment was made on the basis of excluding said stock dividend from income as a dividend, and computing the profit from the sale of said 3,600 shares of class B common stock on the basis of a cost to the plaintiff of $16 per share, which was arrived at by taking the cost ($86,400) of the original purchase of 1,800 shares as the cost to the plaintiff of the original 1,800 shares and the 3,600 shares received in the stock dividend.

VII. During the calendar year 1918 plaintiff sold his original 1,800 shares of class A common stock acquired as aforesaid at $48 per share, and his income-tax return for the year

1918 accounted for and included said sale price with other sales of stocks and bonds during the year 1918. In computing the profit from the sale of said class A common stock plaintiff reported the cost of said shares at $48 per share, or a total of $86,400.

VIII. Thereafter and on or about June 26, 1922, the Commissioner of Internal Revenue caused a field audit to be made of plaintiff's 1917 and 1918 income-tax returns, in which the cost to the plaintiff of said original 1,800 shares of class A common stock was determined to be $16 per share by taking the cost ($86,400) of the original purchase as the cost of the original 1,800 shares and the 3,600 shares received as a stock dividend, instead of $48 per share as returned by the plaintiff. On this basis the cost to the plaintiff of said 1,800 shares of class A common stock was computed to be $28,800, instead of $86,400 paid therefor at the time of purchase, and said audit increased plaintiff's taxable income for the year 1918 accordingly in the amount of $57,600.

IX. Thereafter and on or about April 9, 1923, the Commissioner of Internal Revenue made an additional assessment against this plaintiff upon income for the year 1918 amounting to $28,697.41 which amount plaintiff duly paid to said collector of internal revenue on or about April 19, 1923, under protest. Thereafter and on or about May 1, 1923, plaintiff duly filed a claim for refund of the full amount of said additional tax so paid, which claim for refund was rejected by the Commissioner of Internal Revenue on or about October 29, 1923.

X. If the taxpayer was correct in computing the profit from the sale in 1918 of said 1,800 shares of class A common stock on the cost basis of $86,400 instead of on the cost basis of $28,800 adopted by the Commissioner of Internal Revenue in making such additional assessment then the plaintiff has overpaid his Federal taxes upon income for the year 1918 amounting to $28,697.41.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, John D. Chapman, is seeking by this action to recover the sum of $132,089.99 additional income taxes col-

lected from him for the years 1917 and 1918, $103,371.58 of which was collected for the year 1917, and $28,697.41 for the year 1918. The history of the transaction out of which this controversy arose is as follows:

Throughout the year 1917 plaintiff was the owner of 1,800 shares of the common capital stock of the Bethlehem Steel Corporation, which were acquired at a cost of $48 per share, or $86,400. On January 23, 1917, the directors voted to increase the capitalization of the said corporation, and in this connection declared a stock dividend of 200 per cent upon the common stock; and on February 17, 1917, plaintiff received from the corporation 3,600 shares of the new stock as his proportion of the stock dividend. In his tax return for the year 1917 plaintiff reported said stock dividend as dividend. In the same year, and prior to December 31, 1917, plaintiff sold the 3,600 shares received as a stock dividend for the sum of $371,928.

It is plaintiff's contention that the income resulting from the sale in 1917 of the stock received as a stock dividend in that year was taxable at the rates for prior years under the provisions of section 31 of the revenue act of 1916, as amended by section 1211 of the revenue act of 1917, 40 Stat. 300, 336–337, in which it is provided that in any distribution made by a corporation, whether represented by cash or by stock of the corporation, such distribution shall be considered income to the amount of the earnings or profits so distributed.

The Government contends, on the other hand, that the income resulting from the sale of the stock received as a stock dividend was not the receipt of dividend but was gain or profit derived from the sale of the stock, and that section 31 of the act of 1916 as amended has no application. The Commissioner of Internal Revenue assessed the tax on this basis, computing the tax on the difference between the cost of the stock and the amount realized from its sale, properly applying the 1917 rates.

The theory upon which the commissioner proceeded was correct as determined by the United States Supreme Court

in the case of *Towne* v. *Eisner*, 245 U. S. 418; in *Eisner* v. *Macomber*, 252 U. S. 189, and in other cases, in which it was distinctly held that a stock dividend does not constitute taxable income.

In April, 1918, plaintiff sold his original 1,800 shares of stock, and his income-tax return for the year 1918 included the sale price with other sales of stocks and bonds during that year. In computing the profit from the sale of the 1,800 shares plaintiff reported the cost of said shares at $48 per share, or a total of $86,400. The commissioner, however, in computing the cost of the 1,800 shares properly considered the original cost of $86,400 paid by plaintiff for the 1,800 shares as representing the total cost of both the 1,800 shares and the 3,600 shares distributed as a stock dividend; and on this basis the commissioner fixed the cost of the 1,800 shares at $16 per share and assessed the additional tax accordingly. The plan adopted by the commissioner in ascertaining the profit was correct. To state the question simply, by the payment of the sum of $86,400 plaintiff acquired a capital interest in the corporation, and he received as evidence of this interest 1,800 shares of the original common stock, and without further cost he also received an additional 3,600 shares, or a total of 5,400 shares. His interest in the corporation was neither increased nor diminished by the later acquisition of the 3,600 shares. It remained precisely the same.

The same question applies to the sale of the 3,600 shares, and the same procedure was followed by the commissioner in arriving at the profit on that sale.

The contention of the plaintiff that the Government is barred by the statute of limitations is not tenable. It is the opinion of the court that plaintiff is not entitled to recover. It is therefore the judgment of the court that plaintiff's petition should be dismissed. And it is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

Reporter's Statement of the Case

LUCIUS N. AND EUGENE LITTAUER, COPARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF LITTAUER BROTHERS, v. THE UNITED STATES

[No. C-761. Decided February 14, 1927]

On the Proofs

Contract; consideration stated in part as "premium."—Where a contract provided that for articles to be manufactured by the contractor delivered to the Government in December, 1917, the contractor was to receive $3.00 per unit plus a "premium" of 50 cents, and those delivered in January, 1918, $3.00 plus a "premium" of 45 cents, and it appears from the circumstances and negotiations of the parties prior to and at the time the contract was made that for such deliveries it was their mutual intention that the contractor should receive $3.50 and $3.45, respectively, the contractor is entitled to the said sums for deliveries made in the required time. For deliveries thereafter, in February, 1918, the contractor can not recover more than $3.00 per unit.

The Reporter's statement of the case:

Mr. Dallas S. Townsend for the plaintiff. *Mr. Stewart McDonald* and *Barry, Wainwright, Thacher & Symmers* were on the brief.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs are citizens and residents of the United States and in all respects duly qualified and entitled to sue in this court and on the claim herein. At all times material herein they were engaged in business as copartners under the firm name of Littauer Brothers.

II. The claim of the plaintiffs, which is for the sum of $9,132.95, was made on April 12, 1918. It is based upon an agreement in writing evidenced by a letter from the Office of the Depot Quartermaster, Philadelphia, to the plaintiffs, dated November 3, 1917, and by a contract entered into be-

tween Colonel M. Gray Zalinski, Q. M. Corps, U. S. Army, by Captain V. Stone on behalf of the Government, and Lucius N. Littauer on behalf of the plaintiffs, dated November 5, 1917, numbered 1709 Philadelphia. Copies of the letter of November 3, 1917, and the contract are attached to the petition, marked "Annex B" and "Annex A," respectively, and made a part of this finding by reference.

III. During November and December, 1917, the regular specification winter gauntlet in use by the War Department was made of yellow horsehide hand with a split cowhide cuff, and this gauntlet was at that time being supplied by the plaintiffs to the defendant at $3.00 per pair under a previous contract which was separate and distinct from the contract sued on.

IV. At the time of the negotiations leading up to this contract No. 1709 the Government negotiating officer was authorized to accept and contract for a suitable substitute for the specification winter gauntlet, due to the impossibility of getting a sufficient number of the specification article.

V. On or about November 2, 1917, one Frederick C. Baggs, representing the plaintiffs, entered into negotiations with W. W. Wheeler, jr., a captain in the Quartermaster Corps, at Philadelphia, who was the Government negotiating officer and was acting as Assistant to the Chief of the Purchasing Department in the C. and E. Division of the Philadelphia depot, for the purchase and sale of winter gauntlets. During these negotiations Mr. Baggs informed Captain Wheeler that, due to a lack of materials, the plaintiffs could not make any gauntlets of the regular standard specifications for delivery in December, 1917, and January, 1918, in addition to those already contracted for, and that they would contract for and provide winter gauntlets of khaki smoked degrained horsehide with suede cuff for $3.50 per pair.

VI. The winter gauntlet made of khaki smoked degrained horsehide hand with suede cuff was not a standard specification article and was more expensive to make than the standard specification article, which was made of yellow horsehide hand and split cowhide cuff.

The plaintiffs' representative refused to contract for the smoked degrained horsehide gauntlet at $3.00 per pair for delivery at any time.

VII. Captain Wheeler informed the plaintiffs' representative that a price of $3.50 per pair was satisfactory to the Government, but that the formal contract would have to state this price in different language. And so the contract when drafted provided for the payment of $3.00 per pair plus the so-called "premium" of 50 cents and 45 cents.

VIII. On November 2, 1917, Captain Wheeler, acting for the defendant, agreed with the plaintiffs' representative to pay $3.50 per pair for December, 1917, deliveries of winter gauntlets made of khaki smoked degrained horsehide with suede cuff, and $3.45 per pair for January, 1918, deliveries of the same gauntlet.

IX. The defendant's negotiating officer was not permitted to enter into a contract with a penalty clause. For this reason the contract was prepared in the terms, as to price, in which it was entered into. The actual intention of the contracting parties was that the plaintiffs were to receive $3.50 for each pair of gauntlets delivered under the contract in December, 1917, and $3.45 for each pair delivered in January, 1918.

X. The contract for the supply of these winter gauntlets was awarded the plaintiffs by the War Department, office of the depot quartermaster at Philadelphia, by its letter of November 3, 1917 (Finding II). Acting on and in compliance with this award the plaintiffs proceeded with the making and shipping of the gauntlets specified in the letter of November 3, 1917.

XI. The formal contract for the supply of these gauntlets was prepared by the defendant. It was dated November 5, 1917 (Finding II), and was not received by the plaintiffs until December 11, 1917.

XII. The plaintiffs shipped to the defendant from their factory at Gloversville, New York, 4,320 pairs of the gauntlets during December, 1917, and 15,999 pairs of the gauntlets during January, 1918, the shipments being made via American Express Company. There were rejected and returned

Reporter's Statement of the Case

5 pairs of the December shipments and 498 pairs of the January shipments. The net shipments in December, 1917, were 4,315 pairs and in January, 1918, 15,501 pairs.

At the time the contract was entered into the average time consumed in transit between Gloversville, New York, and Philadelphia, was between 36 and 48 hours.

XIII. By Fuel Administration Publication No. 17, dated January 17, 1918, the plaintiffs were required to shut down their factory at Gloversville, New York, on January 18, 19, 21, 22, and 28, 1918.

Compliance with this order stopped their production for five days and delayed them proportionately in making deliveries under the contract.

XIV. There were four previous contracts between the plaintiffs and the defendant, three of which provided for riding gloves and one, No. 1164, for the regular specification winter gauntlets. Whatever delay, if any, was encountered in the production of the standard or specification gauntlet under Contract No. 1164 was caused solely by the inability of the plaintiffs to obtain the raw material necessary therefor, whereas the materials necessary for the manufacture and production of the gauntlet provided for in this contract were on hand at the time the contract was entered into.

The manufacture and production of the gloves and gauntlets specified in the previous contracts with the defendant were not interfered with in any way by the manufacture and production of the gauntlets under this contract.

XV. There were delivered to the defendant at Philadelphia 2,520 pairs of the gauntlets during December, 1917, and 13,325 pairs during January, 1918. Of the December, 1917, deliveries, 5 pairs were returned to the plaintiffs, and of the January, 1918, deliveries, 338 pairs were returned to the plaintiffs.

The net amount of the December deliveries at Philadelphia was 2,515 pairs, and the net amount of the January deliveries at Philadelphia was 12,987 pairs.

A shipment of 360 pairs on January 18, 1918, was delivered to the defendant at Philadelphia on February 2, 1918. Of this shipment 3 pairs were rejected, leaving net deliveries on February 2, 1918, 357 pairs.

Reporter's Statement of the Case

XVI. The first payment by the defendant was made on or about January 22, 1918, by voucher No. 4054, in the amount of $2,160, against a consignment of 720 pairs of gauntlets. This voucher was returned by the plaintiffs to the Depot Quartermaster at Philadelphia with a claim for the additional 50 cents per pair, or $360, and the defendant, by the Assistant to the Depot Quartermaster at Philadelphia, replied to this claim on January 24, 1918, advising that the premium would be adjusted later in accordance with the respective dates on which the shipments were received. The only payments made by the defendant under the contract have been on the basis of $3.00 per pair, irrespective of the dates upon which the various consignments were shipped and delivered.

XVII. The plaintiffs' claim for the balance due them was presented to the Depot Quartermaster prior to June 30, 1919, and was a sufficient presentation of claim under the Dent Act of March 2, 1919, chap. 94, 40 Stat. 1272. The claim was rejected.

XVIII. On November 6, 1918, the plaintiffs presented the claim to the Auditor for the War Department, by whom it was referred to the Director of Finance, Office of the Quartermaster General, for administrative examination and report, on December 3, 1918. It was placed before the Classification Claims Board, Settlement Division, Finance Service, by which it was referred without recommendation to the Board of Contract Adjustment.

After examination of the papers, and oral hearing, the Board of Contract Adjustment decided that the plaintiffs were entitled to receive $3.50 for each pair delivered to the defendant in Philadelphia during December, 1917, and $3.45 for each pair delivered to the defendant in Philadelphia during January, 1918.

XIX. The plaintiffs requested and obtained a review of the Board of Contract Adjustment's decision by the Secretary of War, contending that the award of the Board of Contract Adjustment was insufficient in amount, in that it did not allow for shipments made during January but not delivered until after January 31, owing to railroad congestion. Upon recommendation of the special advisers the

Secretary of War approved and affirmed the decision of the Board of Contract Adjustment on June 3, 1920, and awarded the plaintiffs the sum of $6,909.65 in full adjustment.

XX. The plaintiffs thereupon accepted this decision and award of $6,909.65, and a voucher therefor was furnished to the plaintiffs, signed and returned by them for collection, but the Auditor for the War Department caused payment on the voucher to be refused, and on appeal the Comptroller of the Treasury, on August 24, 1922, sustained the auditor's decision.

XXI. If the plaintiffs are entitled to recover on the basis of the deliveries by them to the express company they should receive 50 cents each for 4,315 pairs, or $2,157.50, and 45 cents each for 15,501 pairs, or $6,975.45, making a total of $9,132.95.

If the plaintiffs are entitled to recover on the basis of the deliveries by them to the defendant at Philadelphia, they should receive 50 cents each for 2,515 pairs delivered in December, 1917, or $1,257.50, and 45 cents each for 12,987 pairs delivered in January, 1918, or $5,844.15, making a total of $7,101.65.

An allowance of the first five days in February, 1918, for deliveries to the defendant at Philadelphia, would entitle the plaintiffs to an additional sum of $160.65, representing 357 pairs shipped on January 18, 1918, and delivered on February 2, 1918. This allowance, in addition to the sum of $7,101.65 for "gauntlets received," would entitle the plaintiffs to the sum of $7,262.30.

The court decided that plaintiffs were entitled to recover, in part.

GRAHAM, *Judge*, delivered the opinion of the court:

On November 5, 1917, plaintiffs executed a contract with the defendant for the manufacture and delivery on or before January 31, 1918, of approximately 20,000 pairs of smoked degrained horsehide gauntlets, with suede cuffs. They were not the regulation gauntlets used by the War Department.

Prior to entering into this contract plaintiffs were solicited by defendant's representative to take a contract for the man-

ufacture of regulation gauntlets at $3.00 per pair. This they declined to do, for the reason that they did not have the material necessary therefor, but offered to make gauntlets of khaki smoked degrained horsehide, with suede cuffs, for $3.50 per pair. These were more expensive gauntlets, the materials for the manufacture of which plaintiffs had on hand. The plaintiffs at this time had four contracts with the defendant for the manufacture of gauntlets. The latter were badly needed, and defendant wished to avoid delay in delivery under these four contracts and at the same time secure the gauntlets involved in the contract in this case as speedily as possible. Defendant's representative agreed to pay plaintiffs $3.50 a pair for gauntlets delivered in December, 1917, and $3.45 a pair for those delivered in January, 1918, delivery to be made at the Quartermaster's Depot, Philadelphia. The Government's representative stated that the contract would be prepared in different form than usual, and as drawn it stated the price per pair at $3.00 plus a premium of 50 cents for gauntlets delivered in December and 45 cents for those delivered in January.

It was clearly the intention and agreement of the parties to pay plaintiffs as consideration for the delivery of the gauntlets in December $3.50 per pair, and for the delivery in January $3.45 per pair. The Government was to receive as its consideration a higher priced gauntlet than the regulation one, and a prompt and speedy delivery during December and January, these deliveries not to interfere with the contracts which the plaintiffs then had for the delivery of other gauntlets; and the delivery of the latter was not interfered with. A large part of the gauntlets involved in this case were delivered in December and January, and as to these the plaintiffs are entitled to recover.

It will be readily seen that under the terms of the contract, if the plaintiffs failed to deliver the gauntlets on or before the 31st of January, they could only claim on the basis of $3.00 a pair. There was no provision in the contract for liquidated damages for failure to deliver within the time fixed by the contract, and it seems that the representative of the War Department felt that he did not have authority to include a penalty clause. The provisions for

delivery in December and January gave assurance to the Government of speedy delivery.

The use of the word "premium" in this contract is an unusual application of the word. Under the facts of the case it clearly does not mean a gratuity. The use of this word in the contract and the fact that two bases of payment are named render it necessary to refer to the circumstances surrounding the parties prior to and at the time the contract was made, and previous negotiations, in order to discover the true intention; and, as stated, the true intention was to pay the plaintiffs on the basis of $3.50 a pair for gauntlets delivered in December and $3.45 for those delivered in January.

The case of *J. J. Preis & Company* v. *United States*, 58 C. Cls. 81, 86, relied upon by the defendant, is not in point. In that case the plaintiff had entered into a contract with the United States to make certain garments for a price named from cloth furnished by the latter. Some months after this contract was executed another contract was entered into providing that if the plaintiff would make a special effort to avoid all possible waste in cutting the material furnished by the United States, it would receive, for the additional work and care involved, a further compensation of twenty per cent of the net cost of the material saved. The court held as follows:

"There is no evidence to show to what extent savings were made under the supplemental contract. To entitle plaintiff to recover it must show definitely how much material was saved by reason of the contract upon which it sues, and, having failed to do that, there is nothing upon which the court can give judgment."

This is the ground upon which the case was decided. The court in its opinion alluded to the question presented, that the last contract was void for want of consideration, saying:

"Without at this time passing upon that question it may not be amiss to say that contracts of this character will not be looked on with favor by the court."

In the *Preis case* two contracts were involved. Under the first the plaintiff was obligated to do certain work for a

fixed price. The second contract was an agreement to pay him in addition to the original consideration further compensation for the same work. That is not true of the case before us. The question here is, What was the consideration passing to the plaintiffs in the contract? To say that the 50 cents a pair additional to be paid for gauntlets delivered in December and the 45 cents additional for those delivered in January were gratuities is to beg the question. In the *Preis case* it was admitted that the contract price for the work had been fixed in the first contract, while here the question is, What was the intention of the parties as to the contract price? What was the consideration moving from the defendant to the plaintiffs—was it $3.00 per pair for the gauntlets or $3.50 for those delivered in December and $3.45 for those delivered in January? That is the question presented. If it must be admitted at the outset that the contract price of $3.00 was the consideration, there is nothing to decide. That would dispose of the case and make the additional sums payable in December and January mere gratuities. The case is thus easily distinguishable from the *Preis case*.

As to the gauntlets delivered to the American Express Company and shipped during January, but which reached the defendant after the 31st of that month, under the facts it must be held that the plaintiffs can not recover more than $3.00 a pair. This is in conformity with the finding of the Contract Adjustment Board, whose opinion shows a very careful consideration of all the facts and of the questions of law involved. This decision was approved by the legal advisers of the Secretary of War and in turn approved by him. The plaintiffs accepted this decision, a voucher was issued to them for the amount stated, and they indorsed and forwarded it for payment. The Auditor for the War Department stopped payment thereon, plaintiffs appealed to the comptroller, and the position of the auditor was sustained.

The plaintiffs are entitled to recover the sum of $6,909.65, for which judgment should be entered, and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

BOOTH, *Judge*, dissents.

Reporter's Statement of the Case

DELOS C. EMMONS v. THE UNITED STATES

[No. C-788. Decided February 14, 1927]

On the Proofs

Army pay; detail to aviation duty; effect of order.—During the period that a duly qualified junior military aviator is detailed to "duty requiring him to participate regularly and frequently in aerial flights" he is entitled to the pay provided for such duty.

Same; acceptance of less than statutory pay.—Where a statute fixes the pay of an Army officer his compensation rests upon an act of Congress and not upon a contract, and his acceptance of less than the statutory compensation does not estop him from claiming the full amount.

The Reporter's statement of the case:

Mr. Cornelius H. Bull for the plaintiff. *Mr. George A. King* and *King & King* were on the brief.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Delos C. Emmons, was an officer, aviation section of the Signal Corps, United States Army. By orders from the War Department, dated July 14, 1917, plaintiff was ordered to report to headquarters of the Western Department, San Francisco, for assignment to duty as aeronautical officer of that department. Having reported to headquarters on July 27, he was assigned to duty as aeronautical officer, Western Department, with station in San Francisco, to date from July 27, 1917. By special orders No. 172 of the War Department, dated July 26, 1917, the plaintiff, together with other officers named, was announced as on duty "that requires them to participate regularly and frequently in aerial flights from the dates indicated after their names, * * * First Lieut. Delos C. Emmons, aviation section, Signal Corps, March 5, 1917." By the same orders, designated officers, among them Capt. Delos C. Emmons, "now detailed in the aviation section of the Signal Corps," were rated as junior military aviators. These orders

remained in force during the entire period covered by this claim.

II. On December 4, 1917, the Secretary of War directed that plaintiff proceed, when relieved, to Washington, D. C., and report upon arrival to the Chief Signal Officer of the Army for duty, and on December 7, 1917, the plaintiff was relieved as department aeronautical officer at San Francisco and proceeded to Washington where he reported for duty on arrival and was assigned to duty as aeronautical officer in the office of the Chief Signal Officer, United States Army, and served until February 28, 1918.

III. On September 5, 1923, on motion of plaintiff, the court made a call on the War Department, asking, among other things, for "a statement showing all aerial flights made by claimant between the dates of July 27, 1917, and March 1, 1918," and on September 29, 1923, the reply of the War Department to this call was filed in the clerk's office. In this reply it is stated, among other things, that there was inclosed "a transcript of the flying record of Lieutenant Emmons covering the period in question. Dates on which flights were performed are not of record." This transcript of plaintiff's flying record, inclosed in said reply, is as follows:

WAR DEPARTMENT AIR SERVICE

Transcript of the flying record of D. C. Emmons, major, A. S. active duty as shown by Pilot Book while stationed at various stations for the period from March, 1917, to September 16, 1920

Type of ship flown	Duty	Total hours	Proficient	Remarks
Curtiss JN4–D (student)	Instruction	25	Yes	Estimated time only.
Curtiss JN4	Practice	150	Yes	No records prior to Jan. 1, 1919.
Curtiss JN4	do	25	Yes	
Curtiss JN6–HG	do	½	Yes	Conservative; steady pilot.
Martin T. T	do	10	Yes	
DH–4	do	15	Yes	
Standard J–1	do	5	Yes	
Avro	do	5	Yes	
Miscellaneous types	Passenger	20		
Vought VE–7	Practice	47	Yes	
Martin transport	Passenger	1½		

Station: McCook Field.
Date: October 13, 1920.

IV. Plaintiff received no flying pay previous to March 1, 1918. If entitled to flying pay in his rank as a captain,

Opinion of the Court

aviation section, Signal Corps, with more than 10 years' service, from July 26, 1917, to February 28, 1918, inclusive, he would receive additional pay at the rate of 50 per cent of $240 a month, pay of his grade, namely, $120 a month, making a total for the period of $860.

V. During said period of July 26, 1917, to February 28, 1918, inclusive plaintiff prepared his own pay vouchers, claiming the pay and allowance of the next highest grade, that of major; certified said vouchers as being correct; presented the same to an Army disbursing officer, and received payment thereof, neither claiming nor protesting at not receiving 50 per cent increase of pay for being on duty requiring "regular and frequent aerial flights." Plaintiff made such certificates and received flying pay for the period immediately preceding the period of this claim.

The court decided that plaintiff was entitled to recover $860.00.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

Plaintiff, a junior military aviator, sues for 50 per cent increase in the pay of his grade and length of service, relying upon section 13 of the act of June 3, 1916, 39 Stat. 175, which provides:

"* * * Each duly qualified junior military aviator shall, while so serving, have rank, pay, and allowances of one grade higher than that held by him under his commission if his rank under said commission be not higher than that of captain, and while on duty requiring him to participate regularly and frequently in aerial flights he shall receive, in addition, an increase of 50 per centum in the pay of his grade and length of service under his commission. * * *"

During the period for which claim is made plaintiff was detailed to duty as aeronautical officer, first at the Western Department, San Francisco, and after that in the office of the Chief Signal Officer at Washington, D. C. He was announced, by special orders issued from the War Depart-

ment, as on duty that required him to participate regularly and frequently in aerial flights, and by the same orders was rated as a junior military aviator and detailed in the aviation section of the Signal Corps. During the whole period for which he now seeks increased pay he was under these orders. The provision of the statute authorizing an increase in the pay of an officer "while on duty requiring him to participate regularly and frequently in aerial flights" is not materially different from the provision of the act construed in the *Luskey case*, 262 U. S. 62, affirming the judgment of this court in 56 C. Cls. 411. We said in this case: "When, therefore, the plaintiff was lawfully detailed to duty involving actual flying in aircraft he must be regarded and treated as entitled to the consequences of such detail and to the pay provided for such duty." See also *Marshall case*, 59 C. Cls. 900; *Matteson case*, 60 C. Cls. 880. In the *Clark case*, 60 C. Cls. 589, the plaintiff, with other officers was "announced as on duty requiring them to participate regularly and frequently in aerial flights from February 12, 1918." The order continued in force during the period covered by the claim. He sued for the pay authorized by the act of June 4, 1920, 41 Stat. 769, section 13 (a) of which provides: "Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights." Following the *Luskey case*, the court said (p. 591): "When an officer is on duty requiring him to participate regularly and frequently in aerial flights he is entitled to the pay provided for in the statute during the time he is on such duty from the day he is placed on such duty until he is detached therefrom." See also *Bradshaw case*, No. D–322, decided November 16, 1926, 62 C. Cls. 638.

The orders in the instant case directed the plaintiff to report to headquarters of the Western Department for assignment to duty as aeronautical officer of that department. By special orders dated July 26, 1917, plaintiff was announced as on duty requiring him to participate regularly and frequently in aerial flights. We think the facts bring the case within the meaning and intent of the statute and

that the plaintiff is entitled to the increased pay for which he sues.

A second defense interposed by the Government is that the plaintiff is now estopped from claiming increase in pay for the period in question. This defense is predicated upon a finding made at the request of defendant (Finding V) that the plaintiff made out his pay vouchers and did not claim the increase now sued for, and certified to the correctness of the vouchers, and that he was paid the amount of them and accepted payment without protest. The pay here claimed is provided for by statute, and his receipt of less than the statute authorized and required to be paid does not estop him from claiming the amount legally due. The case of *Garlinger*, 169 U. S. 316, is not applicable in a case where the claim of the officer is for an amount due by statute. The distinction between the two classes of cases—one upon an implied contract and the other for a statutory allowance—is made in *Whiting's case*, 35 C. Cls. 291, 301. In *Bancroft's case*, 56 C. Cls. 218, which was a suit to recover a uniform gratuity provided for by statute, and in which it appeared that a waiver of all claim to this uniform gratuity had been made, the Government insisted on the waiver as a defense. This court said: "It is not necessary to discuss the rule at length. It is well settled to the general effect that agreements to forego any part of a statutory compensation will not be enforced and that recovery may be had for a withholding under such agreement." The judgment was affirmed, 260 U. S. 706. See also *Glavey*, 182 U. S. 595; *Andrews*, 240 U. S. 90; *Katzer case*, 52 C. Cls. 32, 37. The compensation sought in this case is fixed by statute. It does not rest "upon any contract, express or implied, with the Government but upon acts of Congress which provided for his compensation." *McDonald case*, 128 U. S. 471; *Embry case*, 100 U. S. 680, 685.

Our conclusion is that the plaintiff is entitled to recover the increased compensation. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

Reporter's Statement of the Case

JACOB LEVY, SAMUEL LEVY, AND VICTOR LEVY, PARTNERS, AS JACOB LEVY & BROTHERS, v. THE UNITED STATES

[No. D-284. Decided February 14, 1927]

On the Proofs

Sale of surplus supplies; authority of Secretary of War to cancel sale; return of purchase price.—The Secretary of War, selling supplies under the acts of July 9, 1918, and July 11, 1919, had power to authorize local boards of sales control to cancel a sale "on account of discrepancy in identity of goods." Where a cancellation so made was approved by him and he notified the purchasers that upon return of the articles delivered they would be reimbursed the original purchase price, and the purchasers returned a portion of them, and the portion returned was accepted by the War Department, the purchaser is entitled to reimbursement of the original purchase price on the portion returned.

The Reporter's statement of the case:

Mr. Elwood H. Seal for the plaintiffs. *Mr. Lewis Landes* was on the brief.

Mr. Joseph Henry Cohen, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs are partners trading under the firm name and style of Jacob Levy & Brothers, with their principal place of business in Louisville, Kentucky, and are engaged in the purchase and sale of metals and junk.

II. By the act of July 9, 1918 (40 Stat. 850), the President was authorized "through the head of any executive department, to sell, upon such terms as the head of such department shall deem expedient, to any person, partnership, association, corporation, * * * any war supplies, material, and equipment, and any by-products thereof." By the act of July 11, 1919 (41 Stat. 104, chap. 8), it was further provided that "the Secretary of War be, and he is hereby, authorized to sell any surplus supplies * * * upon such terms as may be deemed best."

Reporter's Statement of the Case

III. Pursuant to the act of July 9, 1918, and by direction of the Secretary of War there was created the Office of Director of Sales, whose function was to supervise sales and to coordinate transfers to other departments of all surplus war materials. Beginning with March 15, 1921, the Director of Sales operated directly under the Assistant Secretary of War. There was further created, pursuant to this act and by direction of the Secretary of War, a sales organization known as the Surplus Property Division, which, during all the time hereinafter mentioned, operated as a branch of the Quartermaster Corps, effecting sales subject to the approval and direction of the Director of Sales.

IV. Prior to November 22, 1921, there was published, issued, and distributed to the plaintiffs among others a catalogue entitled, "Public Auction Sale at Army Supply Depot, Jeffersonville, Ind., of Quartermaster Surplus Property, Tuesday, November 22, 1921, 10 o'clock A. M. Central Standard Time." The conditions and terms of sale, as recited in said catalogue, are fully and correctly set out in the petition at pages 6 to 9, inclusive, with certain corrections. The conditions and terms of sales as set forth in the petition at pages 6 to 9, inclusive, with corrections are made a part of this finding by reference.

V. Lot No. 40 is listed and described in the sales catalogue as follows:

CLOTHING AND EQUIPAGE

Lot No.	Article	S. P. D. No.	Quantity
40	Rope, wire, copper clad 7/16" Class "A"	C-1764	275,000 ea.

VI. On November 22, 1921, at the public auction held at Jeffersonville, the plaintiffs submitted a bid of 2¼c per foot for 270,000 feet of the wire rope listed for sale in the catalogue as Lot No. 40. This offer was accepted by the officer of the surplus property division in charge of the sale.

VII. Before submitting their bid the plaintiffs inspected a sample but failed to measure same. This sample consisted of a complete roll of the wire rope which was in the room at the time and place of the sale.

VIII. On December 14, 1921, the defendant delivered to the plaintiffs 270,000 feet of the wire rope listed in the

sales catalogue as Lot No. 40. The plaintiffs received the same and paid to the defendant the full contract price of $6,075, which sum was covered into the Treasury in December, 1921, as miscellaneous receipts.

IX. Upon delivery of the aforesaid wire rope, it was found to measure in thickness between ⅜" and 13/32".

X. On December 30, 1921, the plaintiffs wrote to Major Castleman, Central Surplus Property Control Officer, at Chicago, Illinois, that the size of the wire rope was ⅜" and not 7/16" and requested a reasonable allowance.

XI. On February 21, 1922, the plaintiffs' claim for an allowance was considered by the Chicago Local Board of Sales Control; and recommendation was made that the claim be disallowed, "in view of the condition of sale, price at which rope was sold, and the small difference of 1/32" in the size of the rope purchased and the rope delivered."

XII. On October 27, 1922, the plaintiffs' claim was reconsidered by the Washington Local Board of Sales Control. On October 31, 1922, the Quartermaster General, by "A. B. Warfield, Assistant," wrote to Mr. Landes, attorney for the plaintiffs, the letter annexed to the petition as Exhibit B. On December 4, 1922, the Quartermaster General, by "G. A. Zautner, for A. B. Warfield, Assistant," wrote to Mr. Landes the letter annexed to the petition as Exhibit C. These letters are made a part of this finding by reference.

XIII. Paragraph 312 of Circular No. 1, issued by the Office of the Quartermaster General of the Army under date of January 3, 1922, provided as follows:

"312. Local boards of sales control.—(a) There will be originated by each quartermaster supply officer in charge of a surplus property area a surplus property local board of sales control. Each surplus property local board of sales control will consist of not less than three commissioned officers, designated by the quartermaster supply officer, one of whom shall be the surplus property officer. The surplus property local board of sales control will act as a board of review, approval, and direction with respect to all sales conducted under the direction of the quartermaster supply officer of the control depot within the following limits:

"It will pass upon the acceptance of bids and may reject any or all bids or permit bids to be withdrawn where consideration of policies and fair dealings may require.

Reporter's Statement of the Case

"It will make adjustments of all claims arising between the purchaser and its particular control depot in matters of discrepancies in quantity, condition, or quality of goods delivered, or such other conditions involving consideration or fair dealing.

"The board will make adjustment of claims and authorize the payment of refunds in so far as the law permits, where funds have not been covered into the Treasury.

"(b) To the local board of sales control in the surplus-property division, this office, is reserved the right to determine fixed price on commodities for sale on the market or to a designated purchaser, in accordance with the principles and policies set forth in Article XVIII, compilation of Supply Circulars and Supply Bulletins, Purchase, Storage, and Traffic Division, General Staff, 1919."

This paragraph was amended by Changes No. 104, issued by the Office of the Quartermaster General of the Army under date of August 23, 1922, reading as follows:

(C. O. Q. M. G. Cir. 1.)

CHANGES—O. Q. M. G. CIRCULARS

Changes No. 104.

WAR DEPARTMENT,
OFFICE OF QUARTERMASTER GENERAL,
Washington, August 23, 1922.

Subparagraph (a), paragraph 312, of Circular No. 1, O. Q. M. G., January 3, 1922, is changed to read as follows:

312. (a) There will be originated by each quartermaster supply officer in charge of a surplus property area a surplus property local board of sales control. Each surplus local board of sales control will consist of not less than three commissioned officers, designated by the quartermaster supply officer, one of whom shall be the surplus property officer. The surplus property local board of sales control will act as a board of review, approval, and direction with respect to all sales conducted under the direction of the quartermaster supply officer of the control depot within the following limits, but will not authorize a cancellation of a sale except as hereinafter provided.

It will pass upon the acceptance of bids, and may reject any or all bids or permit bids to be withdrawn where it is to the manifest interest of the Government to do so.

It may make final adjustment of all claims arising between the purchaser and its particular control depot in matters of

discrepancies in the identity or quantity of goods delivered, or other conditions involving an improper delivery of the specified goods purchased; but it will not make adjustment in the unit prices or otherwise alter the essential terms of the sale except as to quantity sold.

The board will receive all claims and complaints in writing, signed by the claimant, and as soon thereafter as possible make an examination of and inquire into all of the facts and circumstances connected with the matter complained of; take and receive all testimony or other evidence bearing upon the claim or complaint; and in cases beyond its authority to make final adjustment, it will transmit the same, together with its recommendation, through the Office of the Quartermaster General to the Office of the Assistant Secretary of War for final action.

(C. O. Q. M. G. Cirs. No. 104, August 23, 1922.)
(400.703 A-A, Surplus Property Control Depots.)

W. H. HART,
Acting Quartermaster General.

XIV. On November 25, 1922, the plaintiffs, acting on the aforesaid letter of October 21, 1922, returned to the Surplus Property Division at Jeffersonville, Indiana, at their own expense, 255,835 feet of the said wire rope.

XV. On February 13, 1923, the Surplus Property Division at Jeffersonville, after due advertisement, sold the said 255,835 feet of wire at public auction for $2,878.14, the best obtainable price. The expenses of the resale, consisting of auctioneer's fees and storage charges, amounted to $73.70. The proceeeds of said resale were placed and are now on deposit with the War Department.

XVI. On December 26, 1923, the defendant, through the Chief of Finance, War Department, forwarded to the plaintiffs for signature a public voucher covering the resale of the said wire rope in the amount of $2,878.14, which voucher the plaintiffs refused to sign.

XVII. The plaintiffs have demanded from the defendant the payment of $5,756.29, which was the original invoice price of the 255,835 feet of wire rope returned. The defendant has refused to do this.

The court decided that plaintiffs were entitled to recover.

Opinion of the Court

GRAHAM, *Judge*, delivered the opinion of the court:

The facts are fully stated in the findings. It is not necessary to go into the details further than to state that prior to November 22, 1921, the Secretary of War advertised for sale through a catalogue certain surplus property in the possession of the War Department. On November 22, 1921, the plaintiffs purchased, paid for and received 270,000 feet of wire rope listed for sale in said catalogue as Lot No. 40 and therein described as follows:

CLOTHING AND EQUIPAGE

Lot No.	Article	S. P. D. No.	Quantity
40	Rope, wire, copper, clad 7/16" Class "A"	C–1764	275,000 ea.

The wire rope delivered to the plaintiff was not size $\frac{7}{16}''$ as advertised but was ⅜". The conditions of the sale were such that had the plaintiffs sought to recover the purchase price upon the ground of this description, they could not have recovered. See *Triad Corporation* v. *United States*, *post*, p. 151, this day decided, and authorities cited. However, plaintiffs stated the facts to the proper War Department official, who upon consideration of all the circumstances decided to cancel the sale and so informed the plaintiffs, stating in a written notice that if they would return the rope at their own expense the Government would reimburse them in the amount of the original purchase price. Thereupon plaintiffs promptly returned 255,835 feet of the wire rope and it was accepted by the Government. The Government has never reimbursed plaintiffs.

After receiving back the rope the Government, without notice to plaintiffs, readvertised and sold it at a price less than that paid by plaintiffs. The amount realized from this sale was tendered to plaintiffs, who refused to receive it.

The act of Congress of July 9, 1918, 40 Stat. 850, authorized the President "through the head of any executive department, to sell, upon such terms as the head of such department shall deem expedient, any war supplies, * * *." The act of July 11, 1919, chap. 8, 41 Stat. 104,

authorized the Secretary of War "to sell any surplus supplies * * * upon such terms as may be deemed best."

On October 31, 1922, the Assistant Secretary of War informed the plaintiffs as stated that the contract of sale had been canceled and that upon the return of the material they would be reimbursed in the amount of the original purchase price. Plaintiffs returned 94% of the material and it was received and accepted by the representative of the Government.

The question is whether plaintiffs are entitled to recover the purchase price of the material returned.

The above-cited statutes give the Secretary of War full power to dispose of this war material "upon such terms" as he shall "deem expedient" or "may be deemed best." This necessarily conferred upon him full and ample discretion in the matter of handling and disposing of this surplus material. He could prescribe regulations controlling the sales, name the terms and conditions, and could provide for adjustments of claims arising out of sales when he thought the circumstances warranted it, and he did actually so provide in departmental order of August 23 (Finding XIII). In this order authority was given to local boards theretofore created, under whose direction the property was placed and the sale made, to review the action of the officer making the sale and to authorize the cancellation thereof "on account of discrepancy in identity of goods," and if they deemed a case beyond their authority for final adjustment, to transmit it to the Assistant Secretary of War "for final action." The local board did cancel the sale involved herein, and its action was approved by the Assistant Secretary of War, who, in notifying the plaintiffs of his decision, stated that "upon receipt of the rope" the plaintiffs "would be reimbursed in the original purchase price." The plaintiffs returned 255,835 feet of the wire rope to the defendant, the value of which at the purchase price is $5,756.29, and for this amount the plaintiffs are entitled to judgment, and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

STUART D. CAMPBELL v. THE UNITED STATES

[No. D-803. Decided February 14, 1927]

On the Proofs

Army pay; authority to assign junior officer to higher command while senior officer is present.—See *Kinsolving* v. *United States, ante,* p. 79.

Same; operations against an enemy; effect of armistice November 11, 1918.—Upon the signing of the armistice November 11, 1918, there was no enemy to operate against within the meaning of the act of April 26, 1898, providing for increase of pay to officers exercising a higher command.

The Reporter's statement of the case:

Mr. Cornelius H. Bull for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Stuart D. Campbell, was appointed first lieutenant, Officers' Reserve Corps, effective August 15, 1917, and took the oath of office on August 9, 1917. Plaintiff was on active duty in France with Company H, Eighteenth Infantry, on January 20, 1918, when the following order was issued:

HEADQUARTERS EIGHTEENTH INFANTRY,
France, January 20, 1918.

Special Orders No. 15.

[Extract]

2. First Lieut. S. D. Campbell, Eighteenth Infantry, will assume command of Company E, relieving First Lieut. John R. Fountain, Eighteenth Infantry.

By order of Colonel Parker:

WM. WINTERS,
Captain and Adjutant, Eighteenth Infantry.

Plaintiff complied with his order, assumed command of Company E, Eighteenth Infantry, as directed, and remained continuously in command thereof until July 21, 1918, when,

as a result of a compound fracture of his right arm and hip by a machine-gun bullet wound in an attack upon the German line at Soissons, France, he was evacuated to a hospital.

II. According to the testimony of the plaintiff on the issuance of Special Orders No. 15 and his taking command thereunder of Company E, First Lieut. John R. Fountain, who had been in command of said Company E, and senior in rank to plaintiff, remained with said company some time over one year afterwards.

III. After plaintiff returned to Company E, Eighteenth Infantry, on or about August 19, 1918, the organization was under the command of Capt. M. P. Reed until November 28, 1918, when the following order was issued:

HEADQUARTERS EIGHTEENTH INFANTRY,
Luxembourg, 28 November, 1918.

Special Orders No. 225.

[Extract]

10. First Lieut. S. D. Campbell, Eighteenth Infantry, will assume command of Company E, vice Captain M. P. Reed, transferred to Company F.

By order of Colonel Hunt:

L. H. THOMAS,
Captain and Adjutant, Eighteenth Infantry.

Plaintiff remained in command of said Company E until March 26, 1919, when he was appointed captain.

IV. At all times between January 20, 1918, and March 26, 1919, Company E of the Eighteenth Infantry was in France as a part of the American Expeditionary Forces. During the period January 20, 1918, to November 11, 1918, this organization was engaged in actual combat with enemy forces on the western battle front and on July 18 the First Division, of which the Eighteenth Infantry was a part, attacked the German line at Soissons. Company E of the Eighteenth Infantry also took part in active trench warfare in the Toul sector at Beaumont. This organization also assisted in the capture of the town of Cantigny, France.

After November 11, 1918, Company E of the Eighteenth Infantry with the First Division was assigned to guard

the frontier of occupied German territory. During the period from November 18, 1918, to March, 1919, and immediately after the armistice, and until March 31, 1919, Company E of the Eighteenth Infantry constituted a part of the American Army of occupation occupying German territory.

V. The Adjutant General of the Army, War Department, reported July 23, 1920, to the Auditor for the War Department that when plaintiff joined Company E in compliance with this order he was the senior officer present, and the orders under which he commanded for the period November 28, 1918, to March 31, 1919, was a competent order of assignment under then existing regulations and was approved.

VI. If entitled to the difference in pay and allowances claimed the amount due plaintiff for the period from January 20, 1918, to July 20, 1918, is $260.87, and the amount due for the period from November 28, 1918, to March 25, 1919, is $211.06.

The court decided that plaintiff was not entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

This is a claim of an officer who while serving in France during the war with Germany was assigned to exercise a command above that pertaining to his grade. He claims under the provisions of the act of April 26, 1898, 30 Stat. 365, which reads as follows:

"That in time of war every officer serving with troops operating against an enemy who shall exercise under an assignment in orders issued by competent authority a command above that pertaining to his grade shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

The claim is made for two periods of time; the first from January 20, 1918, to July 21, 1918; the second from November 29, 1918, to March 26, 1919.

The claim for the first period is the sum of $260.87.

On January 20, 1918, the plaintiff was serving with Company H of the Eighteenth United States Infantry in France while war was existing between the United States and Ger-

many, and the said regiment was operating against the enemy in the field. On January 20, 1918, the plaintiff received an order from the colonel of the regiment directing him to take command of Company E of the same regiment. He obeyed said order and took command of Company E, and continued in command thereof until July 21, 1918, on which day he was wounded in battle and sent to the hospital, where he remained for four months and two days. During the time from January 18 to July 21, 1918, the company which he commanded was engaged frequently in actual combat with the enemy.

At the time the plaintiff was assigned by order of the colonel of the regiment to command Company E he was a first lieutenant, and when he took command there was serving with the said company, and available for duty, a first lieutenant senior to himself. The Government contends that under the one hundred and nineteenth article of war, which reads as follows:

"*Rank and precedence among Regulars, Militia, and Volunteers.*—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade."

the order issued by the colonel of the regiment to the plaintiff was illegal and void, and that the colonel of the regiment had no authority to issue it, and that it was not issued by competent authority. In this view it is upheld by a decision of the Comptroller of the Treasury, 26 Comp. Dec. 691. This contention is based upon the fact that when the plaintiff was assigned by order to take this command a senior officer was present and was available for duty, and that the only authority of law for assigning a junior officer of any Army organization to take command of such organization in time of war while his senior officer is present and available for duty is by order or authority of the President. It seems to us that the order of the colonel of the regiment was not legal, and that the meaning of the act of April 26, 1898, was that the order assigning the officer to the command above that pertaining to his grade must be issued by competent authority.

Syllabus

No one, in the face of the language of the one hundred and nineteenth article of war above quoted, had such competent authority save and except the President of the United States. It does not appear that it was necessary to issue such an order, nor is it suggested that First Lieutenant Fountain, who was the ranking officer present and available for duty when this order was issued, was incapable or that he had been guilty of any offense, military or otherwise. Indeed, it would seem one of those cases which makes plain the wisdom of the one hundred and nineteenth article of war.

As to the second period of time, from November 18, 1918, to March 25, 1919, for which the plaintiff claims the sum of $211.06, we are of opinion that he can not recover. The armistice was agreed upon on November 11, 1918; at the time of his assignment to this duty there was no enemy to operate against. The war was over so far as operations against the enemy were concerned and therefore the plaintiff does not bring himself within the terms of the act of April 26, 1898. Moreover, the same reasons which defeat his claim for the first period are applicable here, even though it might be said that our troops after the armistice were operating against the enemy.

The petition of the plaintiff must be dismissed, and it is so ordered.

Moss, *Judge;* Graham, *Judge;* Booth, *Judge;* and Campbell, *Chief Justice*, concur.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. v. THE UNITED STATES[1]

[No. C-910. Decided February 14, 1927]

On the Proofs

Railroad transportation; accounting with Railroad Administration; charge against other carriers.—Where sums erroneously claimed by the accounting officer to have been overpaid the plaintiff are charged by the Railroad Administration to carriers not shown to have participated in the transportation involved and are not refunded by the plaintiff, the plaintiff can not recover.

[1] Writ of certiorari denied.

The Reporter's statement of the case:

Mr. Lawrence H. Cake for the plaintiff. *Britton & Gray* were on the brief.

Messrs. Perry W. Howard and *Louis R. Mehlinger*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation and a common carrier by railroad of freight and passengers.

II. At the time of the service hereinafter mentioned the plaintiff and its connections had entered into certain "equalization" agreements to accept the lowest net fares as computed via competing land-grant routes. Circular 15, Quartermaster General, May 18, 1922.

III. During the period beginning April 6, 1917, and ending October 5, 1917, inclusive, the plaintiff, as initial carrier, upon request of defendant's authorized officers, transported certain troops of the United States, and the defendant paid the plaintiff the charges therefor due under the said "equalization" agreements from point of origin to the final destination on its connecting lines.

In calculating the amounts due there were applied the net fares computed by way of certain portions of the Missouri Pacific system, over which land-grant deductions of 100 per cent were proper under the granting act of July 28, 1866, chapter 300.

IV. With respect to all of the said transportation the total difference between the amount paid to the plaintiff on the 100 per cent land-grant basis, as stated in Finding III, and the amount to which it would have been entitled according to the said "equalization" agreements, with the said portions of the Missouri Pacific system subject to land-grant deductions of 50 per cent (act of October 6, 1917), is $21,166.35.

V. (1) With respect to a part of said transportation the Auditor for the War Department, claiming that the plaintiff had been overpaid $10,731.51 thereon, deducted that amount in September and October, 1919, from certain unsettled accounts of the United States Railroad Administration.

Opinion of the Court

(2) A portion of this amount, $5,643.33, was paid by the plaintiff to the Railroad Administration in final settlement therewith.

(3) The balance of the deduction, $5,088.18, has not been paid by the plaintiff to the Railroad Administration, or to the defendant, but was charged back through Federal revenue accounts in January, 1920, to the other Federal lines interested in the Federal bills from which the deduction was made.

The court decided that plaintiff was entitled to recover the sum of $21,166.35 (Finding IV) and the sum of $5,643.33 (Finding V (2)), the two sums aggregating the sum of $26,809.68, and that as to the item of $5,088.18 (Finding V (3)), its petition should be dismissed.

Campbell, *Chief Justice*, delivered the opinion of the court:

There is a stipulation of the facts in this case showing several items of the claim for which plaintiff is entitled to a judgment. A part of the claim, however, presents a question determined by this court in the *Southern Pacific Company case*, No. 34717, decided December 6, 1926, 62 C. Cls. 649. That question arises upon the following facts:

The plaintiff presented its bill and was paid. Subsequently the Auditor for the War Department, claiming that plaintiff had been overpaid, deducted the amount of the alleged overpayment from certain unsettled accounts of the United States Railroad Administration. A portion of this amount was paid by the plaintiff to the Railroad Administration in its final settlement therewith, but a part of the overpayment has not been paid or accounted for by the plaintiff to the Railroad Administration nor to the United States. This amount, approximately $5,000, was by the Railroad Administration charged back through certain of its accounts in 1920 to the other Federal lines interested in the bills from which deductions were made. In the *Southern Pacific case* it was said: "Without showing that it has accounted for them to the Railroad Administration, the plaintiff can not recover the amount. Its bill was paid originally in full, and if the Railroad Administration has not required reimburse-

ment on account of the deductions it is plain that plaintiff has not lost anything. To the extent it has made such reimbursement it is entitled to recover." So in this case the plaintiff has been paid in full. It has not settled the part of the claim in question with the Railroad Administration, and the charging by the Railroad Administration of the items to other parties would not arm the plaintiff with the right to recover in the absence of proof that it has accounted to these other persons for the amount. See *Chicago, Burlington & Quincy* case, No. C–28, decided this day, *ante*, p. 83.

Plaintiff is entitled to judgment as shown in the conclusion, but as to the other item, the petition is dismissed.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

J. HUNGERFORD SMITH GRAPE JUICE CO. v. THE UNITED STATES

[No. D–372. Decided February 14, 1927]

On the Proofs

Beverage tax; assessment on sale price; inclusion of transportation charges.—The tax of 10 per cent on the sale price of beverages, provided by section 628 of the revenue act of 1918, is not assessable on the cost of transporting said beverages from the manufacturer to his customer, whether prepaid or not.

Same; inclusion of cash discount.—Where in a sale of beverages, taxable under section 628 of the revenue act of 1918, the customer receives a discount for prompt payment, the tax is on the net price paid by the customer and not on the discount in addition thereto.

Same; cost of bottling, etc.—The cost of bottles and containers and the expense of bottling and preparing for shipment are included in the sale price of beverages, and are taxable under section 628 of the revenue act of 1918.

The Reporter's statement of the case:

Mr. John Lord O'Brian for the plaintiff. *Mr. Ralph Ulsh* and *Slee, O'Brian & Hellings* were on the briefs.

Mr. Charles T. Hendler, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Reporter's Statement of the Case

Messrs. Fred K. Dyar and *Joseph H. Sheppard* were on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized under the laws of Michigan, with its principal place of business at Lawton, Michigan, and during the years 1919, 1920, and 1921 was engaged in manufacturing and selling unfermented grape juice.

II. The plaintiff's manufactory was during the said years situated at Lawton, Michigan, and it sold its products throughout the entire territorial area of the United States, shipments being made from Lawton. A general sales office was maintained at Rochester, New York.

III. During the period from February 25, 1919, to and including December 31, 1919, the plaintiff paid to the United States, pursuant to section 628 of the revenue act of 1918, approved February 24, 1919, and effective February 25, 1919, a beverage tax in the amount of ten per cent of certain sums being gross sales of grape juice as shown by the schedule here immediately following, the divisions of time corresponding to the plaintiff's accounting periods. The dates of the several payments of taxes are set forth in Schedule 2 of Exhibit A of the petition. The said exhibit is made a part hereof by reference.

From February 25, 1919, to August 31, 1919, the tax paid amounted to $61,277.87 upon gross sales of $612,778.70.

From September 1, 1919, to August 31, 1920, the tax paid amounted to $104,557.10 upon gross sales of $1,045,571.

From September 1, 1920, to August 31, 1921, the tax paid amounted to $24,912.21 upon gross sales of $249,122.10.

From September 1, 1921, to December 31, 1921, the tax paid amounted to $149.96 upon gross sales of $1,499.60.

The total tax paid for the entire period was $190,897.14 upon gross sales of $1,908,971.40.

IV. The foregoing amounts of gross sales included certain transportation charges on the grape juice from Lawton, Michigan, to points of delivery to customers, certain items.

of cash discounts deducted by customers from the list or invoice price and not paid nor received as a part of the purchase price of the grape juice, and also the cost or value of the containers in which the grape juice was sold and the expense of bottling and packing the grape juice into the containers.

V. On June 14, 1923, and within four years from the dates of payment of all of said taxes, the plaintiff filed with the collector of internal revenue at Grand Rapids, Michigan, a claim for the refund to it of $67,803.45, such claim being for the refund of $4,011.22 of said beverage tax paid on cash discounts deducted by customers, of $9,044.94 of such tax paid on freight charges included in gross invoice amounts, of $42,041.53 of such tax paid on cost of containers, complete with labels, caps, and packages, and of $12,705.76 of such tax paid on the expense of bottling, labeling, and packing the grape juice sold.

On February 21, 1924, the plaintiff's said claim for refund was wholly rejected and disallowed by the collector of internal revenue.

VI. The plaintiff sold its grape juice to jobbers throughout the United States, and sales and shipments were made in one of the following ways:

(*a*) In carload lots direct to jobbers, in which case the freight was paid by the jobber at destination and the amount paid for freight was deducted from the invoice amount in making payment to the plaintiff.

(*b*) By shipments in carload lots from Lawton, Michigan, to forty or fifty distributing warehouses throughout the United States at convenient distributing points from which deliveries in small quantities were made to customers within convenient range of the particular warehouse. In this class of shipments the freight was prepaid from the plaintiff's factory at Lawton to the warehouse and again from the warehouse to the customer. This method of delivery was used in order to obtain the benefit of carload freight rates and at the same time to have on hand at points distant from the factory a stock of goods from which local deliveries could be promptly made.

Reporter's Statement of the Case

(c) In less-than-carload lots directly from the plaintiff's factory to customers, in which case the freight was usually prepaid.

VII. The plaintiff was advised by the collector of internal revenue at Grand Rapids at a conference when the beverage tax of 1918 became effective that it was not permissible to deduct transportation charges from gross invoice amounts before computing the beverage tax, and for this reason a different practice prevailed with the plaintiff from February 25, 1919, to June 20, 1919 (at about which time the plaintiff obtained knowledge of article 9 of Treasury Regulations 52), from that which prevailed after that date.

VIII. When shipments in carload lots were made to jobbers from February 25, 1919, to June 20, 1919, the goods were invoiced at a certain price stated thereon, "Less freight"; that is, the freight charges were paid at destination by the customer, who deducted from the invoice amount the amount of transportation charges paid by him and remitted to plaintiff the remainder. On all invoices for such shipments the words "Less freight" were written on the invoice, but the amount of the freight was not actually ascertained and extended, although this could readily have been done.

IX. Plaintiff's Exhibit No. 4 is a typical invoice of these shipments, and shows the following practice, unessentials omitted:

"GENERAL OFFICES,
"*Rochester, N. Y., 4-26-19.*

"Sold to Bailey-Hale Co.,
"Corpus Christi, Texas.
"Shipped to same.
"As: May 1, 1919.
"Terms: 30 days net; 2 per cent 10 days.
"Shipped from Lawton, Mich., via IC-Mo. Pac.-Gulf Coast R. R.

435 cs. qts. Royal Purple Grape Juice @ $6.50	$2, 827. 50	
200 cs. pts. Royal Purple Grape Juice @ $6.75	1, 350. 00	
15 cs. 4 oz. Royal Purple Grape Juice @ $7.25	108. 75	
	4, 286. 25	
50 sets advertising. Less 17½%	750. 09	
	3, 536. 16	
Plus 10% Government tax	353. 62	
		$3, 889. 78

"F. o. b. Lawton, Mich., less freight.
"Car St. L. & S. F. 1478.
"This invoice is subject to $70.72 cash discount if paid on or before May 10, 1919."

X. On all of these shipments thus made and invoiced the plaintiff paid the 10% beverage tax not only on the amount received by it from the customer but also on the amount of transportation charges paid by the customer and deducted by him from the face of the invoice.

XI. The total amount of freight paid by the customers and deducted on these shipments was $48,212.75, and the tax paid on amounts so deducted was $4,821.27.

XII. After June 20, 1919, on shipments sold and invoiced "Less freight," the plaintiff ascertained the amount of freight from Lawton, Michigan, to destination and entered it on the invoice, deducting it from the gross amount of the invoice and computed the 10% beverage tax on the balance, so that on these shipments no beverage tax was paid on the freight, although sold and invoiced in the same way as the "Less-freight" shipments prior to that date except that the amount of the freight was ascertained in advance at Lawton instead of at the time it was paid. This later practice was intended to conform with article 9 of U. S. Treasury Regulations 52.

XIII. On shipments in carload lots from Lawton to distributing warehouses the freight was prepaid at Lawton to the warehouse. When the goods thus shipped to a warehouse were reshipped to a local customer in smaller quantities than carloads the freight was also prepaid from the warehouse to the customer. Such sales, therefore, had the transportation charges prepaid from Lawton to the customer.

XIV. On these sales the beverage tax was paid on the whole invoice amount without any deduction of transportation charges prior to computing the tax.

XV. A typical invoice from Lawton to a warehouse is plaintiff's Exhibit No. 2, such shipments being usually consigned to the plaintiff itself. The invoice is as follows:

Reporter's Statement of the Case

"GENERAL OFFICES,
"*Lawton, Mich.*, *4-8-20.*

"Sold to J. Hungerford Smith Grape Juice Co., Lawton, Mich.
"Shipped to Louisville Public Warehouse Co., Louisville, Ky.
"Shipped from Lawton, Mich., via G. R. & I., Richmond, Big 4, Cinn., L. & N.:

303 cs. qts. Royal Purple grape juice.
246 cs. pts. Royal Purple grape juice.
6 cs. ½ pts. Royal Purple grape juice.
88 cs. 4 oz. Royal Purple grape juice.
80 cs. ½ gals. Royal Purple grape juice.
41 sets advertising matter.

"MEMORANDUM INVOICE

"Car I. C. 58192.
"Freight prepaid."

XVI. Plaintiff's Exhibit No. 3 is a typical invoice of a shipment from a distributing warehouse to a local customer, and reads as follows:

"GENERAL OFFICES,
"*Rochester, N. Y.*, *4-8-20*

"Sold to Black Diamond Products Co., Fairmont, W. Va., #1726.
"Shipped to Consolidation Coal Co., Jenkins Warehouse, Jenkins, Ky.
"Terms: 30 days net; 2 per cent 10 days.
"Shipped from Louisville, Ky.

125 cs. qts. Royal Purple grape juice @ $6.25	$781.25
100 cs. pts. Royal Purple grape juice @ $6.50	650.00
25 cs. 4 oz. Royal Purple grape juice @ $7.00	175.00
	1,606.25
Less 17½%	281.09
	1,325.16
[1 set advertising matter.]	
Plus 10% U. S. Government tax	132.52
	1,457.68

"Freight prepaid.

"This invoice is subject to $26.50 cash discount if paid on or before 4-18-20."

XVII. Other shipments were made freight prepaid directly from the factory in Lawton, Michigan, to the customer, in less-than-carload lots and in those cases also the

beverage tax was computed and paid as 10% of the amount of the invoice, without any deduction being first made of transportation costs.

XVIII. A typical invoice of this last class of shipments is plaintiff's Exhibit No. 1, which is as follows:

"GENERAL OFFICES,
"*Rochester, N. Y., 7–9–19.*

"Sold to Fayette Candy Co., Uniontown, Pa.
"Shipped to same.
"Terms: 30 days net; 2 per cent 10 days.
"Shipped from Lawton, Mich.

5 cs. pts. Royal Purple grape juice @ $6.50	$32.50	
Less 17%	5.69	
[1 set advertising.]	26.81	
Plus 10% Government tax	2.68	
		$29.49

"Freight prepaid.
"This invoice is subject to 54¢ cash discount if paid on or before July 19, 1919."

XIX. The plaintiff was required to and did pay the 10% beverage tax on the transportation cost included in the invoiced price on all sales from February 25, 1919, to December 31, 1921, except those carload shipments made freight collect and invoiced "less freight" with the amount of freight entered on the invoice made subsequent to June 20, 1919.

XX. The amount of freight on shipments during the period involved, included in invoice amounts upon which the beverage tax was paid, was $90,449.38 and the tax paid on this transportation was 10% of this amount, or $9,044.94.

The payments of these sums are divided as follows:

February 25, 1919–August 31, 1919, freight	$58,113.45;	tax, $5,811.34
September 1, 1919–August 31, 1920, freight	20,513.86;	tax, 2,051.39
September 1, 1920–August 31, 1921, freight	11,442.05;	tax, 1,144.21
September 1, 1921–December 31, 1921 freight	380.02;	tax, 38.00
	90,449.38	9,044.94

The item of taxes amounting to $4,821.27, which was paid on "less-freight" shipments shipped collect from February 25, 1919, to June 20, 1919, set forth above, is included in this total tax on freight, amounting to $9,044.94.

XXI. All of plaintiff's sales were made at quoted prices to the customers, which included transportation charges, whether shipments were made prepaid or collect. The cost of the transportation was never separately indicated on the invoice.

XXII. The return to the plaintiff for the grape juice sold was the same whether the goods were shipped freight collect and invoiced "less freight," and freight paid and deducted from the invoice by the customer (in which case no tax was collected on the transportation cost except for the first few months) or shipped and invoiced with transportation charges prepaid, in which case the beverage tax was paid on the cost of transportation.

XXIII. The plaintiff sold its goods subject to a discount of 2 per cent from face of invoice when payment was made by customer within 10 days. The tax, however, was computed on the basis of the full amount of the face of the invoice regardless of payments by the customer within the 10-day period.

The total amount of cash discounts taken by customers in this manner, upon which the Government collected from the plaintiff the 10 per cent beverage tax, was $40,112.20, and the tax collected upon these discounts was $4,011.22, which is the amount of plaintiff's claim for refund of taxes paid on cash discounts.

XXIV. The plaintiff's grape juice was sold entirely in glass containers of different sizes, usually four-ounce, six-ounce, eight-ounce, sixteen-ounce, thirty-two ounce and sixty-four ounce. The container cost included the cost of the glass bottle, the label, the caps for the bottles, and the case in which the bottles were packed. Containers were purchased by the plaintiff by cases complete with these items, and a year's supply was contracted for annually.

The cost to the plaintiff of these complete containers for the grape juice sold by it during the tax period was as follows:

On grape juice sold from February 25, 1919, to August 31, 1919, $125,874.24.

On grape juice sold from September 1, 1919, to August 31, 1920, $242,033.73.

On grape juice sold from September 1, 1920, to August 31, 1921, $52,074.37.

On grape juice sold from September 1, 1921, to December 31, 1921, $432.94.

The total cost of the complete containers of the grape juice sold by the plaintiff from February 25, 1919, to December 31, 1921, was $420,415.28.

XXV. The taxes paid by the plaintiff were computed on the invoice amounts without deduction for the cost of the containers, and the amount of taxes paid on the cost of such containers, a refund of which is claimed, was 10 per cent of said $420,415.28, or $42,041.53.

XXVI. The grape juice sold was pressed in the autumn and stored in cellars in large containers until the pressing season was over and the season's juice all on hand. It was then bottled, and when bottling was going on no other operations were being conducted at the factory.

The expense of the bottling operations includes the labor cost of drawing and heating the juice, washing bottles, filling, Pasteurizing, labeling, sealing, inspecting, and the proper proportion of general overhead chargeable to bottling operations.

The bottling and packing cost of the grape juice sold during the time in question, as shown by the plaintiff's records, was as follows:

On grape juice sold from February 25, 1919, to August 31, 1919, $49,346.84.

On grape juice sold from September 1, 1919, to August 31, 1920, $62,980.97.

On grape juice sold from September 1, 1920, to August 31, 1921, $14,597.76.

On grape juice sold from September 1, 1921, to December 31, 1921, $132.03.

The total expense of bottling and packing the grape juice sold by the plaintiff from February 25, 1919, to December 31, 1921, upon which the beverage tax was paid amounted to $127,057.60.

XXVII. In computing and paying beverage taxes no deduction was made from invoice amounts of this bottling and packing expense.

The amount of taxes paid on the portion of invoice amounts of sales which represented this bottling and packing expense was 10 per cent of $127,057.60, or $12,705.76.

XXVIII. In all of the sales made, during the period involved, an amount equivalent to that of the tax paid by the plaintiff to the defendant was separately indicated on the invoice and paid by the customer to the plaintiff.

The court decided that plaintiff was entitled to recover the sum of $13,056.16 with interest at the rate of 6 per cent per annum from December 31, 1921, to date of judgment, amounting to $4,010.42; in all, $17,066.58.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, J. Hungerford Smith Grape Juice Company, is engaged in the business of manufacturing unfermented grape juice for beverage purposes, which it sells at wholesale. The product is placed in glass containers of various sizes, which are packed in boxes, cartons, or other containers for delivery to its customers. Its manufacturing plant is located at Lawton, Michigan, and sales were made to customers throughout all parts of the country. All sales were made by plaintiff under agreement that the price should be two per cent less than the gross invoice if paid within ten days. Deliveries were made in several ways: (1) In carload lots directly from factory to customer, in which case the goods were invoiced "less freight" and the freight was paid by the customer at point of destination, and the amount so paid was deducted from the invoice in making remittance to plaintiff; (2) by shipments in carload lots to certain distributing warehouses at convenient distributing points, from which deliveries in smaller quantities were made to customers within convenient range of the warehouse. In this class of shipment the goods were consigned to plaintiff in care of the warehouses, the freight was prepaid from the factory to the warehouse, and again from the warehouse to the customer; (3) in less-than-carload lots directly from factory to the customer, in which case the freight was usually prepaid.

By section 628 of the revenue act of 1918, approved February 24, 1919, and effective February 25, 1919, 40 Stat.

1116, it was provided "that there shall be levied, assessed, collected, and paid, in lieu of the tax imposed by sections 313, 315 of the revenue act of 1917, (a) * * * upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or uncarbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to ten per centum of the price for which so sold." This act continued in force from February 25, 1919, until December 31, 1921.

Following the enactment of this statute plaintiff was required to include transportation charges in the total amount of the invoice, and the ten per cent tax was calculated on that total.

On May 3, 1919, the Commissioner of Internal Revenue promulgated regulations relating to the tax on beverages which provided that if goods were sold and delivered at a certain point, less freight to be paid by purchaser, the freight should be deducted before computing the tax. Thereafter no further tax of this character was demanded or paid. However, the Government continued to impose and collect a tax on transportation charges in all cases where the freight was prepaid by plaintiff at the factory.

It is plaintiff's contention that it was the intent and meaning of the act above set forth to levy a tax upon the sales price of grape juice alone exclusive of transportation cost, and also exclusive of the value, cost, and expense of bottles and containers, and the expense of bottling and preparing the goods for shipping. Proceeding upon this theory, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of tax collected on sums which included such items as the basis for the application of the ten per cent tax, which claim was denied by the commissioner.

With reference to plaintiff's claim with regard to transportation charges, we are of the opinion that it was improper to compute the tax on amounts including freight charges in either class of shipment. The price or return actually received by the manufacturer was precisely the same, whether the goods were invoiced at a price less freight, the customer paying the freight and deducting it from the amount of invoice, or whether the freight was prepaid by

Syllabus

the plaintiff at the factory. In both cases the customer paid the transportation charges, and such charges did not constitute a part of the price for which the goods were sold. Plaintiff should recover on this item the sum of $9,044.94 with interest.

It was also improper to include in the total sum upon which the tax was computed the cash discount. Under the language of the statute "tax equivalent to ten per centum of the *price for which so sold*," fairly construed, means the price fixed by agreement of the parties and paid to the manufacturer. In this case the manufacturer offered its goods at two prices, one being the regular selling price payable in thirty days, and the other being the regular selling price less two per cent if paid within ten days. The customer could accept either price, and the acceptance of the latter proposal constituted the agreement between the parties as to the price for which the goods were sold. Plaintiff is entitled to recover on this item $4,011.22 with interest.

It is the opinion of the court that plaintiff's claim in the matter of cost of bottles and containers, and the expense of bottling and preparing goods for shipment should not be allowed. It is clear from the evidence, as shown by certain exhibits illustrating the type of invoice used by plaintiff, that all expenses, including cost of bottles and containers, expense of bottling and preparing for shipment, were included in the price charged by plaintiff and paid by the customers. It is the judgment of the court that plaintiff herein recover the two items mentioned with interest. And it is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

TRIAD CORPORATION v. THE UNITED STATES

[No. D-289. Decided February 14, 1927]

On the Proofs

Sale of surplus supplies "as is"; inspection as a condition of sale; failure to inspect.—Where in a sale of surplus supplies plaintiff receives used saddles instead of saddles advertised as unused, and the conditions of the sale are that the property

Reporter's Statement of the Case

is "sold 'as is,' * * * without warranty or guaranty as to quality, character, condition, size, weight, or kind," and that failure of the purchaser to inspect will not be considered a ground for adjustment or rescission, and plaintiff was given opportunity to make such inspection but did not make it, the plaintiff can not recover.

Same; sec. 3744, R. S.—Section 3744, Revised Statutes, requiring the Secretary of War to reduce his contracts to writing, subscribed to by the contracting parties, applies to contracts of sale of surplus property, and the United States is not bound by a contract of sale not in such form.

The Reporter's statement of the case:

Mr. Benjamin B. Pettus for the plaintiff. *Mr. Edward F. Colladay*, *Colladay, Clifford & Pettus* and *McManus, Ernst & Ernst* were on the brief.

Mr. Joseph Henry Cohen, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Dan M. Jackson* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, the Triad Corporation, is a corporation duly organized under the laws of the State of New York, with its principal place of business in the Borough of Manhattan, in the city and State of New York.

II. The following facts were stipulated between the attorneys for the respective parties:

On the 15th day of December, 1922, at Philadelphia, Pennsylvania, there was offered for sale at auction by the Quartermaster's Department, United States Army, certain articles consisting of surplus war materials.

At said sale the plaintiff bid upon and purchased the following articles described in the catalogue of said sale at page 27 thereof, under lot 132, in these terms:

469 E-14161 saddles, McClellan, size 11, unused	382 ea.
470 E-14162 saddles, McClellan, size 11½, unused	690 ea.
471 E-14161 saddles, McClellan, size 12, unused	510 ea.

The bid of plaintiff for such saddles was $4.60 per saddle and the total number of saddles purchased was 1,582, but only 1,576 saddles were delivered.

Reporter's Statement of the Case

The total amount paid for said saddles by the plaintiff was $7,277.20, less $27.60 allowance for the six undelivered saddles, making the net purchase price $7,249.60.

The saddles described in the catalogue of said sale under lot No. 132, and which were bid upon and purchased by and delivered to plaintiff, were not wholly unused saddles, but 1,300 of the said saddles had been used and reconditioned; the remaining 276 saddles delivered to this plaintiff were new and unused.

On or about the 3d day of March, 1923, the plaintiff presented its claim to the quartermaster, intermediate depot, 21st Street and Oregon Avenue, Philadelphia, Pennsylvania, claiming that 1,300 of the saddles purchased and received as aforesaid had been used and reconditioned and were not unused saddles, as stated in the catalogue of said auction sale. The matter was referred to the Director of Sales of the War Department, Washington, D. C., and the said office rejected the claim of plaintiff.

III. Said saddles were advertised and offered for sale in a catalogue designated "Surplus property sale, at Quartermaster Intermediate Depot, Philadelphia, Pa.," and listed and described therein as "Lot No. 132, items 469, E-14161 saddles, McClellan, size 11, unused, 382 ea.; 470 E-14162 saddles, McClellan, size 11½, unused, 690 ea.; 471 E-14161 saddles, McClellan, size 12, unused, 510 ea."

IV. The sample saddle exhibited at the public sale at which plaintiff purchased the 1,576 saddles was an unused saddle. It is shown that plaintiff knew that prospective bidders and purchasers at sales of this kind were permitted and expected to examine the property before bidding on and purchasing same.

V. Plaintiff was familiar with the terms "as is," "where is," and the inspection and warranty clauses appearing in the catalogue or advertising pamphlet, and knew that a copy thereof was placed in the hands of each prospective bidder and purchaser at the sale.

VI. The value of the 1,300 used and reconditioned saddles was about 50 per cent of the amount plaintiff bid and paid for the saddles it purchased.

Opinion of the Court

VII. The following provisions appear on pages 3 and 4 of the catalogue:

"Samples of all property listed for sale in this catalogue will be open for inspection in the auction room at the Quartermaster Intermediate Depot, Philadelphia, Pa., beginning Friday, December 8th, 1922, and daily thereafter (Sunday excepted) to date of sale, between the hours of 9 a. m. and 3 p. m., during which time prospective buyers will have an opportunity to inspect said property.

"In addition to the inspection of samples, guides will be furnished at the point of storage of the property to direct prospective buyers to the actual location of the property.

"No inspection of the property will be permitted during the sale.

"Failure on the part of any purchaser to inspect any property will not be considered as ground for any claim for adjustment or rescission.

"All property listed in this catalogue at said auction will be sold 'as is' and 'where is' without warranty or guaranty as to quality, character, condition, size, weight, or kind, or that the same is in condition or fit to be used for the purpose for which it was originally intended, and no claims for any allowances upon any of the grounds aforesaid will be considered after the property is knocked down to a bidder by the auctioneer.

"No representative of the Government is authorized to make any statement or representation as to quality, character, condition, size, weight, or kind of any property offered at this sale, and any representation or statement made by any representative of the Government concerning any such property will not be binding on the Government or considered as grounds for any claim for adjustment or rescission of any sale."

VIII. Defendant has filed a counterclaim for the sum of $6,191.78, to which formal answer has been filed. There is no proof of the counterclaim in the record.

IX. There is no proof or suggestion of bad faith upon the part of the defendant.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

By an act of Congress the Secretary of War was authorized to dispose of at public auction, surplus property belonging to the Government. Pursuant to this authority certain

property held at an intermediate depot in Philadelphia was advertised for sale in a catalogue designated "Surplus Property Sale, at Quartermaster Intermediate Depot, Phila., Pa.," wherein there was listed and described a lot of McClellan saddles.

On December 15, 1922, at a public sale of these saddles the plaintiff bid upon and purchased 1,582 saddles at $4.60 each, and paid for the same, and there were delivered to him 1,576 saddles, leaving six undelivered, the value of which was afterwards refunded on the basis of the purchase price.

The Government acted in good faith. There is no proof or suggestion to the contrary.

It was known that the Government was not in the business of manufacturing and selling saddles. It was simply selling surplus material which it had purchased and could not use. The Secretary of War had authority to sell only what the Government had. In this case he sold a "lot" of saddles, and plaintiff bid for and bought the lot subject to the terms and conditions of the sale. There was delivered to it and it received what it purchased. See *Fred E. Hummel, trustee*, v. *United States*, 58 C. Cls. 489, 494.

This was not a case of sale by sample. The catalogue containing the conditions of the contract stated where the goods were located, when they could be inspected, and that guides would be furnished to direct prospective purchasers to the location of the property for the purpose of inspection. It further provided:

"Failure on the part of any purchaser to inspect any property will not be considered as ground for any claim for adjustment or rescission."

The property listed in the catalogue, it was stated, was sold "'as is' and 'where is,' without warranty or guaranty as to quality, character, condition, size, weight, or kind, or that the same is in condition or fit to be used for the purpose for which it was originally intended, and no claims for any allowances upon any of the grounds aforesaid will be considered after the property is knocked down to a bidder by the auctioneer."

This is not a claim for shortage in quantity. It is a claim based upon the difference between the quality, char-

acter, or kind of material received and that advertised; that is, that the saddles were not "unused" but used saddles which had been reconditioned—the very situation which the statement just quoted from the Government's catalogue was intended to meet. The plaintiff was thus notified before the sale that if it bid and purchased the lot of material it could not claim any allowance on account of deficiency in quality, character, or kind of material sold and delivered.

The plaintiff did not take advantage of its right to inspect, but bought the lot without inspecting it.

Under the terms of the catalogue it is difficult to perceive how the Government could have given purchasers more specific warning than it did, that they bought at their risk what material it had and was offering for sale; that if a purchaser wished to protect himself he could do so by inspection, full opportunities for which were offered, and that if he failed to inspect and received something other than what he thought he was buying he could have no redress and could not claim allowances by reason thereof. More than that, he was distinctly told that failure to inspect would not be considered as a ground for adjustment. If plaintiff neglected to embrace the opportunity offered it to inspect and purchased the property without doing so, with notice that it bought at its own risk, it created by its own negligence the situation from which it now seeks relief.

Under the conditions of the sale the Government was only obliged to act in good faith, and this it did. The material was sold for what the Government believed it to be. The plaintiff can not recover. See *M. Samuels & Sons, Inc.*, v. *United States*, 61 C. Cls. 373, 380; *Lipshitz & Cohen* v. *United States*, 269 U. S. 90, 92; *Mottram* v. *United States*, 271 U. S. 15; *Maguire & Co.* v. *United States*, 273 U. S. 67.

The foregoing conclusion disposes of the plaintiff's case, but there is another ground which precludes a recovery. The alleged contract relied upon does not comply with the provisions of section 3744 of the Revised Statutes. In the case of *Erie Coal Corp.* v. *United States*, 266 U. S. 518, 521, the court said:

"Moreover, sec. 3744, Revised Statutes, required the Secretary of War to cause every contract made by him, or by

officers under him appointed to make contracts, 'to be reduced to writing, and signed by the contracting parties with their names at the end thereof.' The act of July 11, 1919, authorizing the Secretary to sell surplus war supplies, is not inconsistent with that section and does not repeal or modify it. There is no reason why it should not apply to contracts made in pursuance of the later act. It must be held that, because of the failure to make and sign a written contract as required by sec. 3744, the United States was not bound."

See also *Srere Brothers & Co.* v. *United States*, 60 C. Cls. 994, 999.

The petition should be dismissed, and it is so ordered.

Moss, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

AUBREY I. EAGLE v. THE UNITED STATES

[No. D-924. Decided February 14, 1927]

On the Proofs

Longevity pay; act of September 14, 1922; new pay period during demotion.—The proviso in the act of September 14, 1922, 42 Stat. 840, 841, that "the discharge and recommission of officers in the next lower grade shall not operate to reduce the pay or allowances which they are now receiving or to deprive them of credit for service now counted for purposes of pay or retirement," does not give increased pay for future service, and where an officer who was a captain in the Army June 30, 1922, is demoted to the rank of first lieutenant November 18, 1922, while in his third pay period, he is not entitled after said period, if still in the lower grade, to increase of longevity pay that would have resulted if his service in the lower grade were counted as that of a captain.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff. *Mr. Samuel T. Ansell* was on the brief.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

Opinion of the Court

I. The plaintiff, Aubrey I. Eagle, enlisted in the United States Army on October 13, 1917, as a private, first class, Aviation Section, Signal Enlisted Reserve Corps, and served as such until July 10, 1918, when he was assigned to active duty as a first lieutenant, Signal Officers' Reserve Corps, to which he had accepted appointment December 20, 1917. He served as a first lieutenant until October 26, 1918, when he was appointed captain. He was discharged as a captain on November 18, 1922, and recommissioned in the grade of first lieutenant. He served as first lieutenant until November 7, 1924, when he was again commissioned captain.

II. The plaintiff was paid during the period from November 18, 1922, to November 7, 1924, when he held the grade of first lieutenant at the rate of pay he was receiving when discharged as captain—that is, at the rate of $315 a month, which is base pay of $200 a month, flying pay of $100 a month, and longevity pay of $15 a month—which was the pay of a captain saved to him by the act of September 14, 1922, 42 Stat. 841, instead of at the rate of $166.66 base pay, $91.66 flying pay, and longevity of $16.66 a month, or $284.98 a month as fixed by section 1 of the act of June 10, 1922, 42 Stat. 625, 626, which he would have received had it not been for the proviso in the act of September 14, 1922.

III. If plaintiff was entitled to receive an increase of 10% of his base pay and flying pay upon completion of 6 years of service, he was entitled to receive between the dates of October 13, 1923, and November 7, 1924, base pay at the rate of $200 per month, plus 50 per centum thereof for flying pay, or $300 per month, and a 5 per centum increase for each of the two three-year periods of service, or, in all, $330 per month, or a total increase for said period on account of longevity pay of $192 over the amount actually paid to and received by him.

The court decided that plaintiff was not entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

The question for decision in this case is the proper construction to be given to the following provision contained

Opinion of the Court

in the act of September 14, 1922, 42 Stat. 840, 841, which reads as follows:

"That the discharge and recommissioning of officers in the next lower grade shall not operate to reduce the pay or allowances which they are now receiving or to deprive them of credit for service now counted for purposes of pay or retirement."

This is the case of a captain, demoted to the grade of first lieutenant, who was in the third pay period at the time of his demotion. The provisions of the act above cited permitted him to continue to be entitled to the pay of the third pay period he was entitled to at that time.

The plaintiff, however, claims that he is entitled to the longevity pay of a captain, while in the grade of first lieutenant, notwithstanding the fact that his longevity pay, or the part of it which he claims, accrued while he was serving as first lieutenant and not as captain. In other words, the plaintiff says that the effect of the statute is to give him longevity pay which he earned after his demotion. But in our opinion the statute precludes any increase in pay to accrue to him in the third pay period in the grade of captain upon his attaining a new pay period through service. When he was promoted to the grade of captain and not before was he entitled to any increase of pay over that which he drew after his demotion, unless through longevity in the grade of first lieutenant, and that pay he has received. The act certainly can not be construed as giving increased pay for future services, but insures to officers the pay and allowances which they were receiving at the time of the passage of the act, and no more.

The above is the interpretation given the statute by the War Department and the Comptroller General (3 Comp. Gen. 675), and we think that interpretation is correct.

The petition of the plaintiff must be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GEORGETOWN GROCERY CO. v. THE UNITED STATES

[No. E-541. Decided February 14, 1927]

On the Proofs

Income tax; deductions; debts ascertained to be worthless and charged off within the taxable year.—In order to obtain the benefit of the deduction from gross income on account of worthless debts the taxpayer must bring himself within the statute, sec. 234 (a) (5), revenue act of 1918, and show (1) that, at the time of filing his return, the debt had been ascertained to be worthless, and (2) that it had been charged off within the taxable year.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff during the calendar year 1920 was a corporation existing under and by virtue of the laws of the State of South Carolina, with its place of business in the city of Georgetown in the said State.

II. On or about March 15, 1921, plaintiff duly filed its corporation income and profits tax return for the calendar year 1920, showing thereon a net taxable income of $26,721.54 after taking a deduction of $1,010.72 for bad debts. On the net taxable income disclosed by its return, plaintiff paid a tax of $3,856.71 in various installments—$1,928.36 being paid in two installments up to and including June 15, 1921, and $1,985.76 being paid on September 25, 1924.

III. On or about September 15, 1921, plaintiff filed an amended income and profits tax return for the calendar year 1920, claiming in said amended return a deduction of $22,112.91, alleging that this sum represented a bad debt due plaintiff by the Sampit Contracting Company as of May 1, 1920.

Reporter's Statement of the Case

IV. At the time of filing the said amended return the plaintiff had paid only two installments based upon its original return, namely, the installment of March 15, 1921, and that of June 15, 1921, in the amount of one thousand nine hundred and twenty-eight dollars and thirty-six cents ($1,928.36), and did thereafter, during the month of September, 1921, file a claim for refund thereof. As to the unpaid installments, the plaintiff filed a claim for abatement at or about the time of filing the amended return, which said claim was subsequently rejected by the Commissioner of Internal Revenue and demand made upon plaintiff by the collector of internal revenue for the district of South Carolina in the amount of one thousand nine hundred eighty-five dollars and seventy-six cents ($1,985.76), being the balance of taxes assessed against the plaintiff for the year 1920, which amount plaintiff duly paid on September 25, 1924, making the aggregate amount of taxes paid for the said year 1920 three thousand nine hundred fourteen dollars and twelve cents ($3,914.12).

V. On September 25, 1924, plaintiff made payment of one thousand nine hundred eighty-five dollars and seventy-six cents ($1,985.76), and on the same date duly filed its claim for refund of the aggregate amount of taxes paid for the year 1920, being three thousand nine hundred and fourteen dollars and twelve cents ($3,914.12), and although more than six months have elapsed since the filing of said claim for refund the commissioner has taken no action thereon.

VI. In its original income and profits tax return for 1920 plaintiff included the entire account of the Sampit Contracting Company in its capital assets, but in its amended return plaintiff did not so include said account. The debt evidenced by this account was not charged off on the books and records of the plaintiff corporation during the year 1920, but was charged off in September, 1921, at the time the amended return was filed.

VII. Plaintiff continued to extend credit to the Sampit Contracting Company until December 31, 1921, and received payments on account between May 1, 1920, and December 31, 1921.

VIII. The manager of the plaintiff's business had full and complete authority to conduct the affairs of the company and to extend credit to any purchaser. Furthermore, he had control of the books of account and had authority to adjust or charge off any losses occurring from bad debts ascertained to be worthless during the year 1920. The manager during the said year charged off on plaintiff's books bad debts, ascertained to be worthless during that year, aggregating the sum of $1,010.72, and claimed this amount as a deduction from gross income in the original tax return of the plaintiff. No part of the debt of the Sampit Contracting Company was included in this amount.

IX. No action whatever was taken by the board of directors of plaintiff company during the year 1920 in regard to the account of the Sampit Contracting Company, and no instructions or directions of any character were given by the said board to the manager relative to withholding further credit from the said company or charging off the amount of its debt.

X. During the year 1920, plaintiff made no effort to ascertain the financial status of the Sampit Contracting Company or to collect the debt owed by the said company to the plaintiff. The total amount of judgments outstanding against the Sampit Contracting Company in the year 1920 was $1,826.46, and no effort was made by any of the judgment creditors to reduce their judgments to execution. The record does not disclose that the plaintiff had knowledge of the existence of these judgments in 1920.

XI. On May 1, 1920, the plaintiff opened on its books a new account with the Sampit Contracting Company styled "Purchasing account," and thereafter all purchases made by the said company and payments on account were credited or debited to this new account, with the exception of the payment of interest on one note on September 20, 1920, in the sum of $141.21, and the payment of two notes on March 22, 1921, which were credited to the old credit account. Further credit was extended to the Sampit Contracting Company subsequent to the opening of the so-called purchasing account and the said account was charged with the amount of such credit. This purchasing account was closed

January 10, 1922, after plaintiff had sustained a loss therein to the extent of $3,590.14, which sum was charged off on plaintiff's books, on December 31, 1921, to the profit-and-loss account.

XII. The Sampit Contracting Company continued to operate during the years 1920 and 1921, and subsequent thereto, and continued its business relations with the plaintiff during those years. The record does not disclose that the said company has ever ceased doing business. It is not proved that the debt due the plaintiff by the Sampit Contracting Company had been ascertained to be worthless prior to the filing by plaintiff of its tax return, March 15, 1921, for the calendar year 1920, or that it had been charged off within that year.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff, a corporation doing business in the city of Georgetown, S. C., filed on March 15, 1921, its income and excess-profits tax return for the calendar year 1920, which showed a net taxable income of $26,721.54, after a deduction of $1,010.72 for bad debts. At the time the return was made there was on the books of plaintiff an account with the Sampit Contracting Co. which showed an indebtedness to plaintiff of $22,112.91. On September 15, 1921, plaintiff filed an amended income and excess-profits tax return for the calendar year 1920, claiming a deduction of $22,112.91 on account of the said debt of the Sampit Contracting Co. as a worthless debt. This return showed no taxable liability. At the same time plaintiff filed a claim for the abatement of remaining installments and the refund of $1,928.36 already paid as income tax. Both of these claims were rejected by the Commissioner of Internal Revenue, and the balance of the tax for 1920 in the sum of $1,985.76 was paid on September 25, 1924, on which date plaintiff filed a claim for refund of the entire amount of these two payments, namely, $3,914.12. The Commissioner of Internal Revenue having taken no action on the latter claim within six months, the plaintiff brought this action.

Syllabus

The applicable statute here is sec. 234 (a) (5) of the revenue act of 1918, 40 Stat. 1077, 1078, as follows:

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(5) Debts ascertained to be worthless and charged off within the taxable year.

Under this statute, to entitle plaintiff to the deduction claimed it is necessary that it should satisfactorily show that this debt, at the time of the filing of its tax return on March 15, 1921, had been "ascertained to be worthless and charged off within the taxable year," i. e., 1920.

The court has found that this debt had not been ascertained to be worthless at the time of the filing of plaintiff's tax return, March 15, 1921, and had not been charged off during said taxable year.

The plaintiff has failed to bring itself within the requirements of the statute above cited, and is not entitled to recover.

The petition should be dismissed, and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

G. & H. HEATING CO. v. THE UNITED STATES

[No. E-122. Decided February 14, 1927]

On the Proofs

Contract; work dependent upon other contractors; delays caused by them.—Where a Government contractor, upon the acceptance of his bid, agrees to perform certain work which is dependent upon and may be delayed by the work of other contractors on the same building, and the contract provides that the bidder should examine the site of the proposed work and inform himself thoroughly as to actual conditions, and does not bind the Government to a fixed time for completion of the work, the said contractor can not recover labor and superintendence charges which he was forced to pay on account of delays caused by the other contractors.

The Reporter's statement of the case:

Mr. Marvin Farrington for the plaintiff. *Mr. Charles S. Baker* was on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and engaged in business under the laws of the District of Columbia with its principal office at Washington, D. C. Its corporate name was duly changed March 4, 1922, from Biggs Heating Co. to G. & H. Heating Co.

II. On February 21, 1917, the plaintiff entered into a written contract with the defendant whereby it agreed, for the sum of $40,560, to furnish and install a heating system in a structural shop at the navy yard, Norfolk, Va. The contract provided that the work was to be completed within 180 calendar days from the date of the receipt of a copy of the contract by the contractor.

A copy of said contract is attached to the petition as Exhibit A, and is made a part hereof by reference.

By the terms of the contract specification No. 2301 constituted a part thereof and is attached to the petition as Exhibit B, and is made a part hereof by reference. General Provisions, Bureau of Yards and Docks, is also a part of the contract but is not exhibited with the petition, but among other provisions are the following:

"11. *Continuance of work after time.*—It is mutually understood and agreed that in the event of the work not being completed within the time allowed by the contract, said work shall continue and be carried on according to all the provisions of said contract, unless otherwise directed by the Government, in writing, and said contract shall be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms: *Provided*, That neither an extension of the time beyond the date fixed for the completion of said work nor the permitting or acception of any part of the work after said date shall be deemed to be a waiver by the Government of its right to annul or terminate said contract for abandonment or failure to complete within

the time specified or to impose and deduct damages as hereinafter provided.

"12. *Extension of time.*—For causes of the character hereinafter enumerated extensions of time for the completion of the work may be allowed. Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for consideration and for such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated, shall be deemed and construed as a waiver of all claim and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding. * * *

"14. *Unavoidable delays.*—Unavoidable delays are such as result from causes which are beyond the control of the contractor, such as acts of Providence, fortuitous events, inevitable accidents, abnormal conditions of weather or tides, or general strikes. Delays caused by acts of the Government will be regarded as unavoidable delays. Delays in securing delivery of materials, or by rejection of materials on inspection, or by changes in market conditions, or by necessary time taken in submitting, checking, and correcting drawings or inspecting material, or by similar causes, will not be regarded as unavoidable. Should any delay in the progress of the work seem likely to occur at any time, the contractor shall notify the officer in charge in writing of the anticipated or actual delay, in order that a suitable record of the same may be made. (See paragraph 12.)

* * * * *

"17. *Changes.*—The Government reserves the right to make such changes in the contract, plans, and specifications as may be deemed necessary or advisable, and the contractor agrees to proceed with such changes as directed in writing by the Chief of the Bureau of Yards and Docks. The cost of said changes shall be estimated by the officer in charge, and if less than $500 shall be ascertained by him. If the cost of said changes is $500 or more, as estimated by the officer in charge, the same shall be ascertained by a board of not less than three officers or other representatives of the

Government. The cost of the changes as ascertained above, when approved by the Chief of the Bureau of Yards and Docks, shall be added to or deducted from the contract price, and the contractor agrees and consents that the contract price thus increased or decreased shall be accepted in full satisfaction for all work done under the contract: *Provided*, That the increased cost shall be estimated actual cost to the contractor at the time of such estimate and that the decreased cost shall be the actual or market value at the time the contract was made, both plus a profit of 10 per cent.

"18. *Extras.*—The contract price shall cover all expenses, of whatever nature or description, connected with the work to be done under the contract. Should the contractor at any time consider that he is being required to furnish any material or labor not called for by the contract, a written itemized claim for compensation therefor must be submitted by him to the officer in charge, who will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for decision and formal order covering approved items, if any. The failure or neglect of the contractor to present, as above, his claim for material or labor alleged to be extra within 60 days after being required to furnish or perform the same shall be deemed and construed as a waiver of all claim and right to additional compensation for the furnishing or performance of the alleged extra material or labor, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding.

"19. *Oral modifications.*—It is distinctly understood and agreed that no oral statement of any person whomsoever shall be allowed in any manner or degree to modify or otherwise affect the terms of the specifications, plans, or the contract. Changes shall be made only as herein elsewhere specified."

III. The plaintiff received its copy of the contract so as to set the date for the completion of the work as of September 3, 1917. The construction of the structural shop in which plaintiff was to install said heating system, as well as the foundation for the heaters, the completion of which was essential before plaintiff could commence its work under said contract, was being done by independent contractors.

IV. The plaintiff began work under the contract about June 7, 1917, but because of delay on the part of the con-

tractors of the building was unable immediately to commence the principal work of installing the main heaters with their connection pipes, casings, and ducts. There was also additional delay to plaintiff's work by reason of changes made by the defendant from time to time.

V. The foundation of the said building was not completed until December 9, 1917, and the entire building was not accepted by the Government until February 16, 1918. This delay upon the part of the other contractors engaged upon the building prevented the plaintiff from complying with the terms of its contract, which called for the completion of its contract on September 3, 1917. The contract of the plaintiff was fully performed on April 19, 1918, with the exception of the necessary tests. The Bureau of Yards and Docks determined that the delay of the plaintiff in performing its contract was unavoidable on its part.

VI. From April 19, 1918, until September, 1918, plaintiff was engaged in making the hydrostatic tests required by paragraph 22 of the specifications. These being completed, the next step was the making of steam tests, but because of the inability on the part of the defendant to supply steam through the failure of other contractors to complete their work, these tests were not held until April 15, 1920. At that time the defendant furnished the necessary steam and plaintiff made the steam tests required. The system was found in good order and the defendant thereupon accepted plaintiff's work under the contract and the final payment of the contract price was made, less an arbitrary deduction of $85.44.

VII. During the performance of the work, workmen's wages increased. By reason of the delays caused by other contractors on the work the plaintiff paid in addition to what would have been its costs in labor and superintendence the sum of $1,803.33. This additional amount was paid from September 3, 1917, the date when the work was required to be completed under the contract, to April 18, 1918, when the work was completed.

The plaintiff also paid out for cost of superintendence and labor the sum of $788.90, which was in excess of what it would have had to pay if the contract had been completed

Opinion of the Court

on September 3, 1917, the said sum being paid from April 18, 1918, to September 12, 1918, on which later date the superintendence and labor on the contract was ended, although the final test was not made until April 15, 1920. Included in the above sums are the following items: Trips of executives, $175; superintendent's room and board, $282.75. The plaintiff made no claim for these excess costs until April 30, 1918.

VIII. The plaintiff claims the sum of $1,291.99 as extra costs paid to its subcontractors, New York Blowers Co., which extra costs it claims had been caused by the delays aforesaid. The plaintiff failed to introduce evidence sufficient to sustain this item of alleged damage.

IX. All of the above items, including that of profit, were made the subject of a claim before the public-works officer of the Norfolk Navy Yard and were approved by that officer and sent to the Bureau of Yards and Docks. This bureau forwarded the same to the General Accounting Office for action without approval or disapproval. No payments have been made by the defendant to the plaintiff in any amount under these claims.

The court decided that plaintiff was entitled to recover, in part.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover from the United States the sum of $4,272.20 for certain excess labor and superintendent charges, which it claims it was obliged to expend by reason of delays caused by the United States in the performance of its contract, and also for the sum of $85.44, which the United States arbitrarily deducted from the agreed contract price.

The contract was that the plaintiff should furnish and install a heating system in the structural shop at the navy yard, Norfolk, Virginia, for the sum of $40,560. It was agreed that the work to be done under the contract should be completed within one hundred and eighty days from the date of delivering a copy of the contract to the plaintiff.

A copy was delivered to the plaintiff so as to set the date for the completion of the work as of September 3, 1917.

In the contract the United States reserved the right to make changes and thereby to interrupt the continuity of the work. The contract showed that the building in which the heating system was to be installed was in process of construction, and that the contractor for the heating system should work in conjunction with the contractor who was constructing the building in which it was to be installed. The plaintiff was thus given notice that the building in process of construction might not be completed in time to allow the plaintiff to complete its contract within the time fixed in the contract. As a matter of fact, the building was not completed in time, and the plaintiff was delayed seven months. Nowhere in the contract is there any provision in which the Government binds itself to a fixed time for the completion of the work. The Government granted to the plaintiff extension of time for the completion of the work, and exacted no penalties from the plaintiff for its failure to perform within the time fixed in the contract.

The delays complained of were beyond the control of the Government, and it can not be implied from the provisions of the contract that the Government is bound for any excess wages and superintendent charges which the plaintiff had to pay by reason of delays which the Government could not control and which the plaintiff must have contemplated as being possible when it executed the contract, since the contract provided that bidders should examine the site of the proposed work and inform themselves thoroughly of actual conditions. We think that the petition of the plaintiff must be dismissed as to the item of $4,272.20.

The item of $85.44 which was arbitrarily deducted from the contract price is a valid claim, and we have directed that judgment for that amount be entered against the United States. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

WESTERN RAILWAY OF ALABAMA v. THE UNITED STATES

[No. C–1035. Decided February 14, 1927]

On the Proofs

Railroad rates; shipments into Camp Sheridan, Ala.—On shipments for the Government into Camp Sheridan, Ala., during the year 1917, the plaintiff, as final carrier, having been paid Montgomery rates on bills presented at the higher Camp Sheridan rates, is entitled to recover the difference.

Same; shipment originating at Fort Benjamin Harrison, Ind.—The plaintiff, as last carrier, presented to the Government a bill for freight charges on a shipment originating at Fort Benjamin Harrison, Ind., erroneously stated at rates applying from Indianapolis, which were lower, and was paid the amount therein claimed. Having been thus underpaid the plaintiff may recover on the basis of the correct rates.

The Reporter's statement of the case:

Mr. F. Carter Pope for the plaintiff.

Messrs. Perry W. Howard and *Louis R. Mehlinger*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation and a common carrier of freight and passengers.

II. During the year 1917 the plaintiff, as the last carrier, handled a great number of movements of freight for the War Department into Camp Sheridan, which had been established in or about July, 1917, at Vandiver Park, near Montgomery, Alabama.

III. For the services so rendered the plaintiff submitted its bills to the defendant at published tariff rates to Camp Sheridan, which were higher than the rates applying to Montgomery. The defendant paid some of them at the lower Montgomery rates, and others in full, deducting thereafter from other accounts of plaintiff or from accounts of the United States Railroad Administration the difference between the Montgomery and the Camp Sheridan rates.

The deductions so made from accounts of the Railroad Administration were afterwards, in final settlement, paid by the plaintiff to the Railroad Administration.

The total of the aforesaid deductions from plaintiff's bills and the reimbursement by it to the Railroad Administration is $2,670.34.

IV. Another of plaintiff's bills, so rendered at full tariff rates to Camp Sheridan, was paid by defendant's disbursing officer as rendered. Thereafter the plaintiff, without protest, upon request of the accounting officer, reimbursed the defendant thereon $15.46, representing the difference between the Camp Sheridan and the Montgomery rates.

V. In October, 1917, the plaintiff, as last carrier, delivered a shipment of a number of cars of military impedimenta to defendant at Camp Sheridan which had originated at Fort Benjamin Harrison, Indiana. Its bill therefor was paid by the disbursing officer in the sum of $1,703.20 as presented. The rates used in the said bill were erroneous, being the rates from Indianapolis and not from Fort Benjamin Harrison. The correct freight charges from Fort Benjamin Harrison to Camp Sheridan, less proper land-grant deductions, on said shipment, were $2,231.02, a difference of $527.82, which plaintiff has not been paid.

The court decided that plaintiff was entitled to recover the three items mentioned in Finding III, Finding IV, and Finding V, being a total of $3,213.62.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

One of the items claimed in the petition grows out of the fact that the rates applied by the accounting officers were to Montgomery and not to Camp Sheridan, and the plaintiff is entitled to judgment for this item. See *Louisville & Nashville Railroad Company case*, 59 C. Cls. 886; *Louisville & Nashville Railroad Company case*, C–136, decided November 8, 1926, 62 C. Cls. 786.

(2) Another of the items grows out of the shipments originating at Fort Benjamin Harrison, Indiana, and delivered at Camp Sheridan. The bill as rendered stated the

rates to be from Indianapolis and not from Fort Benjamin Harrison. The stipulation is that the correct freight charges from Fort Benjamin Harrison to Camp Sheridan, less proper land-grant deductions, are the same as claimed, and therefore plaintiff is entitled to recover on this item. There is no question involved here of the so-called Chaloner & Washburn Tariff No. 2, which is given no consideration in this case.

(3) Another small item was rendered at full tariff rates to Camp Sheridan, and the plaintiff is entitled to recover thereunder.

Plaintiff is entitled to a judgment for the three items shown in the conclusion. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

MAGNOLIA PETROLEUM CO. v. THE UNITED STATES[1]

[No. E-11. Decided February 14, 1927]

On the Proofs

Internal-revenue tax; payment of interest on refunds; section 1019, revenue act of 1924; interest payments after date of act.—Where the final determination and allowance and payment of interest on a refund of internal-revenue taxes occurs after the passage of the revenue act of 1924, section 1019 thereof governs as to the interest to be allowed and paid.

The Reporter's statement of the case:

Mr. Barry Mohun for the plaintiff. *Mr. W. H. Francis* was on the briefs.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a joint-stock association, organized April 24, 1911, in the State of Texas, with its principal office in the city of Dallas, in said State. The following individuals, each of whom is a citizen of the United States, constitute

[1] Writ of certiorari granted.

plaintiff's duly chosen board of trustees: E. R. Brown, R. Waverley Smith, E. E. Plumly, W. C. Proctor, Courtenay Marshall, F. V. Faulkner, A. C. Ebie, D. C. Stewart, B. H. Stephens, and W. H. Francis. Plaintiff has always rendered its returns under the Federal taxing statutes on a calendar-year basis.

II. On March 27, 1917, plaintiff filed with the collector of internal revenue at Austin, Tex., its return of income for the calendar year 1916, under the revenue act of 1916, 39 Stat. 756, which return indicated a tax liability of $206,079.86. Plaintiff paid the aforesaid tax to the collector of internal revenue at Austin, Tex., on June 14, 1917.

On June 15, 1917, plaintiff filed with the aforesaid collector an amended income-tax return for the year 1916, which indicated an additional income tax for said year in the amount of $9,772.86. Thereafter the additional taxes shown by said amended return were the subject of an additional assessment, which was made by the Commissioner of Internal Revenue, of income taxes due by the plaintiff for the year 1916, and said additional income taxes in the amount of $9,772.86 were paid under the aforesaid additional assessment, and pursuant to notice of "additional assessment," by plaintiff to the collector of internal revenue at Austin, Tex., on August 7, 1917.

Thus the total income taxes paid by plaintiff for the year 1916 were in the amount of $215,852.72. Said taxes were not paid under protest.

III. On June 17, 1918, plaintiff duly filed with the aforesaid collector of internal revenue its second amended income tax return for the year 1916, which indicated that plaintiff had overpaid its income tax for that year in the amount of $30,217.11. The aforesaid second amended return showed changes and adjustments, which resulted in additions to income on account of accrued earnings from some of the oil leases purchased by plaintiff from the McMan Oil Co. as of December 1, 1916, and there were deductions from income shown by said amended return on account of the purchase of the aforesaid leases because of depreciation and depletion both of properties acquired from the McMan Oil Co. and other properties. The said second amended

return also contained adjustment of operating expenses, depreciation on property not used directly in the production of oil, and adjustments in respect of loss on sale of bonds below par. The aforesaid second amended return was attached to and made part of a claim for refund of $30,217.11, which claim for refund was duly filed by plaintiff with the Commissioner of Internal Revenue on June 17, 1918.

IV. On September 20, 1920, plaintiff filed with the collector of internal revenue at Dallas, Tex., a third amended return for the year 1916 which indicated plaintiff's tax liability for said year to be in the amount of $101,287.28. The aforesaid third amended return was attached to and made a part of a refund claim which was filed with the collector of internal revenue at Dallas, Tex., on September 20, 1920, as aforesaid, and was for the refundment of $114,565.44 "or such greater amount as is legally refundable."

V. On May 18, 1918, plaintiff duly filed with the collector of internal revenue at Austin, Tex., its income and war excess-profits tax returns for the calendar year 1917 under the revenue act of 1916 as amended by the revenue act of 1917, approved October 3, 1917, 40 Stat. 300. Immediately thereafter, because of the settlement by the Bureau of Internal Revenue of the tax liability of plaintiff for the years 1912, 1913, and 1914, and consequent readjustment of invested capital, it became necessary to prepare amended returns for the year 1917 which plaintiff filed with the aforesaid collector of internal revenue on May 27, 1918. The plaintiff's total tax liability shown by the aforesaid amended returns was $1,966,600.87, which was paid to the collector of internal revenue at Austin, Tex., on June 15, 1918. The payment was made involuntarily, under duress, and in order to avoid distraint proceedings by the collector against plaintiff's property and the payment of said taxes by plaintiff was accompanied by a written specific protest which set forth in detail the basis of and reasons for such protest. Such protest was in words and figures as follows:

"The Magnolia Petroleum Company hereby protests against the payment of income taxes which are alleged to be imposed by the act approved September 8, 1916, as

amended by the act approved October 3, 1917, and the war income tax act embodied in said act approved October 3, 1917, and the war excess-profits tax act embodied in said act approved October 3, 1917. The said company protests against the payment of said taxes in the amount of $1,966,600.87, or in any other amount at this time or any other time, and said taxes are paid by the company under protest, involuntarily and under duress, in order to avoid the penalties as prescribed in said acts for nonpayment which the collector of internal revenue for this district states he will enforce against said company in the event payment is not made. The grounds, among others, of such protest and involuntary payment, are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint-stock company, or association or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess-profits tax law is arbitrary and unjust, and without sanction in said act. The said company hereby formally notifies the said collector of internal revenue and the Commissioner of Internal Revenue of its purpose and intention to institute suit or suits against them or either of them or against the United States, as the said company may be advised, for the recovery of said sum or any part thereof, together with interest and all proper costs.

"MAGNOLIA PETROLEUM COMPANY,
[SEAL.] "By E. R. BROWN, *Vice President.*
"Attest:
"W. C. PROCTOR,
"*Assistant Secretary.*"

Thereafter an error was discovered by plaintiff in the amount of interest received by it in the year 1917, and a second amended return containing a correction of such error and indicating additional tax for that year in the amount of $5,390.17, was filed with the aforesaid collector of internal revenue on January 28, 1919, but plaintiff never received notice of assessment or demand for such additional tax and plaintiff never paid such additional tax under said second amended return.

VI. On June 12, 1920, plaintiff duly filed with the aforesaid collector of internal revenue claim for the refundment

of the aforesaid payment of $1,966,600.87. The reasons given in support of said claim were as follows:

"1. Said Magnolia Petroleum Company is a joint stock association organized by contract and not under any statute.

"2. That the payment of $1,966,600.87 was made involuntarily under duress and accompanied by formal written protest.

"3. Said amount was illegally and erroneously assessed and collected in that the statutes imposing the tax are ambiguous and uncertain in terms and are unconstitutional and void; and further, the regulations which have been attempted to be prescribed under said acts are not authorized thereby, and particularly the method of applying the rates of taxation, as is attempted in article 16 and in other articles of said regulations under Title II of the act approved October 3, 1917, is arbitrary and unjust and without sanction under said act.

"4. That the Magnolia Petroleum Company is not a corporation created under the law or laws of the United States or of any State, Territory, or District thereof, within the meaning of the definition of the terms "domestic" and "corporation," as used in section 200 of the war excess-profits tax law of October 3, 1917.

"5. Under the terms of Treasury Decision 2956 defining 'discovery' this company is entitled to a refund of a large part of the aforesaid taxes, the exact amount of which is not known to the company at this time, but the subject is being thoroughly investigated, and as soon as the figures are definitely ascertained a proper showing in respect thereof will be made to the department in accordance with prescribed rules and regulations."

VII. Thereafter, to wit, on September 20, 1920, plaintiff filed with the aforesaid collector of internal revenue another refund claim on account of the year 1917 for the sum of $1,005,519.42, "or such greater amount as is legally refundable." There were attached to such claim and made a part thereof, third amended income and excess-profits tax returns for the calendar year 1917, which indicated a total income and war excess-profits tax liability on the part of plaintiff for the year 1917 in the amount of $961,081.45.

VIII. Shortly after plaintiff, on September 20, 1920, filed its aforesaid refund claims for the years 1916 and 1917 of which claims a third amended return for each of such years was made a part, plaintiff, by its proper representatives,

actively negotiated with officials of the Bureau of Internal Revenue to secure settlement of its taxes for the years 1916 and 1917 and refunds of overpayments which it had made for said years.

IX. Plaintiff furnished to the proper representatives of the Bureau of Internal Revenue all necessary facts and data in support of its refund claims theretofore filed for the years 1916 and 1917 and in a manner acceptable to the officials of said bureau and in accordance with its rules and regulations.

X. Under date of October 8, 1923, the Commissioner of Internal Revenue advised plaintiff in respect of its refund claims for the years 1916 and 1917 as follows:

"Your claims for refund of $30,217.11 and $114,565.44 income tax for 1916 and $1,005,519.42 and $1,966,600.87 income and excess-profits taxes for 1917 have been examined, and the results thereof are shown in the attached schedules.

"The claims are based upon additional amounts claimed for depletion and depreciation for the years involved.

"The claim for refund of $114,565.44 income taxes for the year 1916 will be allowed for $105,571.95 and rejected for $8,993.49 and the claim for refund of $1,966,600.87 income and excess-profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01. The claims for refund of $30,217.11 income taxes for 1916 and $1,005,519.42 income and profits taxes for the year 1917 will be rejected in full.

"The rejection of the claims in the above amounts will appear officially in the next schedule to be approved by the commissioner."

XI. The Commissioner of Internal Revenue upon facts duly furnished him by plaintiff with its refund claims, or separately, and upon facts agreed upon, allowed plaintiff's refund claims on October 11, 1923, as follows:

"Year 1916, claim filed September 20, 1920, for $114,-565.44, allowed for $105,571.95.

"Year 1917, claim filed June 12, 1920, for $1,966,600.87, allowed for $1,131,075.86."

XII. Thereafter, on November 22, 1923, plaintiff received from the Commissioner of Internal Revenue certificate of overassessment in respect of the year 1916, bearing number 118905, and in the amount of $105,571.95. Such certificate of overassessment is in words and figures as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
INCOME TAX UNIT,
Washington.

IT: NR: G-LWM-4.
Certificate of overassessment.
Number: 118905.
Allowed: $105,571.95.
Rejected: $
MAGNOLIA PETROLEUM COMPANY,
Dallas, Texas.

SIRS: An audit of your income-tax returns for 1916, Form 1031, and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

Original assessment (April, 1917; page 29, line 10)	$206,079.86
Additional assessment (June, 1917; page 6, line 20)	9,772.86
Total assessment	215,852.72
Tax liability	110,280.77
Overassessment	105,571.95

The adjustments resulting in the above overassessment are fully outlined in schedules attached to a separate communication to you.

This overassessment is allowed in connection with the examinations of a claim for refund filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the revenue act of 1921.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the collector of internal revenue for your district.
2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or
3. The balance (if any) of the overpayment is refunded to you by a check of the Treasury Department, forwarded herewith.

Interest status will be determined as soon as necessary data can be assembled.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By S. ALEXANDER,
Head of Division.

Schedule number: 7264.
District: 2d Texas.
Amount abated: $
Amount credited: $
Year:
Account number: 6/176/20 4/17/29/10.
Amount refunded: $105,571.95.
Instructions executed, Oct. 30, 1923.

GEO. C. HOPKINS,
Collector Int. Rev.

The above certificate of overassessment was accompanied by Treasury warrant payable to the order of plaintiff by which $105,571.95 on account of income taxes for the year 1916 were refunded to plaintiff.

XIII. On November 22, 1923, claimant received from the Commissioner of Internal Revenue certificate of overassessment in respect of the year 1917, bearing No. 16,366, and in the amount of $1,131,075.86. Such certificate of overassessment is in words and figures as follows:

OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
INCOME TAX UNIT,
TREASURY DEPARTMENT,
Washington.

IT: NR: G-LWM-4.
Certificate of overassessment.
Number: 16366.
Allowed: $1,131,075.86.
Rejected: $

MAGNOLIA PETROLEUM COMPANY, *Dallas, Texas.*

SIRS: An audit of your income-tax return for 1917, Forms 1031 and 1103 and examination of related claims (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

Original assessment (May, 1917, page 625, line 2)	$1,966,600.87
Tax liability	835,525.01
Overassessment	1,131,075.86

The adjustments resulting in the above overassessment are fully explained in schedules attached to a separate communication to you.

This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed by section 3228 of the Revised

Statutes as amended by section 1316 of the revenue act of 1921.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the collector of internal revenue for your district.
2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or
3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department forwarded herewith.

Interest status will be determined as soon as necessary data can be assembled.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By S. ALEXANDER,
Head of Division.

Schedule number: 7264.
District: 2d Texas.
Amount abated: $
Amount credited: $
Year:
Account number: 5/18/625/2.
Amount refunded: $1,131,075.86.
Instructions executed, Oct. 30, 1923.

GEO. C. HOPKINS,
Collector, Int. Rev.

The above certificate of overassessment was accompanied by Treasury warrant payable to the order of plaintiff by which $1,131,075.86 on account of income and excess-profits taxes for the year 1917 were refunded to plaintiff.

XIV. The two aforesaid certificates of overassessment for the years 1916 and 1917 were accompanied by Treasury warrant payable to the order of the plaintiff in the sum of $1,236,647.81, which represented refundment of income taxes for the year 1916 in the amount of $105,571.95 and of income and excess-profits taxes for the year 1917 in the amount of $1,131,075.86.

Thereafter, to wit, under date of January 18, 1924, the Commissioner of Internal Revenue wrote to plaintiff's coun-

Reporter's Statement of the Case

sel in respect of interest on the aforesaid refundments as follows:

"Reference is made to your personal request for the allowance of interest on amounts refunded to the above-named taxpayer for the years 1916 and 1917.

"Bureau records show that certificate of overassessment No. 118905 was issued in the amount of $105,571.95 for 1916 and certificate of overassessment No. 16366 was issued in the amount of $1,131,075.86 for 1917 and both of such amounts were listed and allowed as refunds on Schedule IT: A 7264.

"Section 1324 (a) of the revenue act of 1921 authorizes the payment of interest on amounts refunded only upon the allowance of refund or credit claims. It is, therefore, held that if a refund is made subsequent to the filing of a refund claim that part of the overassessment which is based upon the ground or basis of the claim constitutes an allowance of the claim in that amount (upon which interest is payable), but that interest is not allowable upon any amount allowed other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act, without reference to a claim having been filed.

"Examination discloses that allowances of claims were made as follows:

1916 taxable year

Amount of overassessment allowed upon the basis of the second amended return and claim dated June 6, 1918 (filed June 18, 1918), for the refund of $30,217.11	$22, 360. 22
Amount of overassessment allowed upon the basis of the third amended return and claim dated July 12, 1920 (filed September 20, 1920), for the refund of $114,565.44	82, 853. 32
Amount of overassessment allowed upon the basis of points not raised in claims	358. 41
Total overassessment for 1916	105, 571. 95

1917 taxable year

No part of the overassessment was allowed on the basis of claim dated June 9, 1920, for the refund of $1,996,600.87.	
Amount of overassessment allowed upon the basis of third amended return for claim dated July 12, 1920 (filed October 26, 1920), for the refund of $1,005, 519.42	105, 556. 34
Amount of overassessment attributable to points not raised in claims	1, 025, 519. 52
Total overassessment for 1917	1, 131, 075. 86

Reporter's Statement of the Case

It therefore appears that interest is allowable as follows:

On $22,360.22 from December 18, 1918 (six months after the claim was filed) to October 11, 1923 (the date of allowance of the claim)	$6, 457. 20
On $82,853. 32 from March 20, 1921 (six months after the claim was filed), to October 11, 1923	12, 714. 01
Total interest due on refund for 1916	19, 171. 21
On $105,556.34 from April 26, 1921 (six months after the claim was filed), to October 11, 1923 (the date of allowance)	15, 565. 94
Total interest due on refunds for 1916 and 1917	34, 737. 15

"If you take exception to the ruling made herein, or a review is desired, you may, within thirty days from the date of this letter, file an appeal, with a brief or memorandum in support thereof."

XV. Under date of February 9, 1924, the Commissioner of Internal Revenue addressed a communication to plaintiff through its counsel as follows:

"Reference is made to bureau letter dated January 18, 1924, upon the subject of interest payable under section 1324(a) of the revenue act of 1921 to the above-named taxpayer on refunds of overpayments of taxes for the years 1916 and 1917.

"In connection with your subsequent verbal statement to the effect that a larger amount of interest is payable than indicated in said letter, for the reason that in your opinion the taxes were paid under protest, you are informed that the returns filed for the year 1916 do not indicate that a protest of any character was submitted in connection with the payment for that year. The receipts heretofore filed with the bureau by the taxpayer for payments of $206,-079.86 and $9,772.86 showing the 'paid' stamp of the collector dated June 14, 1917, and August 7, 1917, respectively, do not bear any notation to the effect that these payments were made under protest.

"With respect to the year 1917, the receipt heretofore filed with the bureau by the taxpayer for the payment of $1,966,-600.87 showing the 'paid' stamp of the collector dated June 29, 1918, contains a rubber-stamp impression 'paid under protest.' The files of the bureau contain a document marked 'copy,' a copy of which is transmitted herewith. In this document it is stated that protest is made against the payment of taxes in the amount of $1,966,600.87. This protest was apparently filed with the first amended return for 1917, inasmuch as an office record copy of that return shows a tax

liability in said amount. The essential part of the protest is as follows:

"'The grounds among others of such protest and involuntary payment are that said acts are unconstitutional and void, and their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint-stock company or association or insurance company within the meaning and intendment of said acts; the regulations which have been attempted to be prescribed under said acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in article 16 and in other articles of said regulations under the war excess-profits tax law is arbitrary and unjust, and without the sanction of said act.'

"It will be noted that this protest is general in terms and does not contain a specific or detailed basis. Inasmuch as this document is not specific and does not set forth in detail the basis of and reasons for such protest, thus advising the Government specifically of the taxpayer's basis for alleging that the tax had been improperly assessed and collected, and further does not specify the basis upon which the refund for the year involved was made, it is held that such protest is insufficient under the terms and provisions of section 1324(a) of the revenue act of 1921, to require the payment of interest from the date of payment of the tax upon any part of the amount refunded for 1917."

XVI. Under date of July 2, 1924, the Commissioner of Internal Revenue addressed a communication to plaintiff through its counsel as follows:

"Reference is made to your letter dated February 23, 1924, transmitting an appeal to the commissioner from the conclusions reached by this office in connection with proposed allowances of interest on refunds of taxes overpaid for the years 1916 and 1917 by the above-named taxpayer.

"Upon consideration of the appeal, it is held that interest is payable in the amounts indicated in the letter from this office dated January 18, 1924, except that in view of the fact that the claim for the refund of taxes paid for 1917 was apparently filed September 20, 1920 (instead of October 26, 1920, as indicated in said letter), interest is payable on $105,556.34 from March 20, 1920, six months after such date.

"The interest found due, therefore, amounts to $19,171.21 on the refund of 1916 taxes, and $16,197.84 on the refund of 1917 taxes.

"In connection with the claim that interest should be paid upon the amounts refunded from the respective dates

of payment of the taxes, you are informed that bureau files contain no copy of a specific protest with regard to the payment of the 1916 taxes, and it is held that the protest under which it is contended that the 1917 taxes were paid is not a specific protest setting forth in detail the basis of and reasons for such protest. The language used in the protest in question is general, and the taxpayer merely contends that the regulations and the method of applying the rates of tax are arbitrary and unjust, but no attempt was made to specify in what manner the regulations or the method of imposing the tax was improper. Such a general statement is not a sufficient protest within the meaning of section 1324(a) of the revenue act of 1921.

"With respect to the contention that the claims filed, especially those attached to the third amended returns, covered the grounds upon which the refunds were made you are informed that a claim must set forth specifically the grounds upon which the refund is sought, and a claim covering certain items can not be subsequently amended to include others. After a careful review, it is held that the analysis of the allowance of claims included in bureau letter dated January 18, 1924, is correct, and that interest has been properly computed with respect to such part of the refunds attributable to the points raised by the taxpayer in the claims filed. The fact that the certificates of overassessment recited that the refunds were based upon the taxpayer's claim is not controlling for interest purposes. Accordingly the taxpayer's appeal was denied with respect to all points except the date upon which the claim for the refund of 1917 taxes was filed, as indicated above.

"The interest found due will be scheduled for allowance and payment."

XVII. On the 21st day of July, 1924, plaintiff received Treasury warrant payable to its order bearing date July 18, 1924, in the amount of $35,369.05. There accompanied said Treasury warrant notices of interest allowance for the years 1916 and 1917. The notice of interest allowance for the year 1916 was in words and figures as follows:

TREASURY DEPARTMENT,
INTERNAL REVENUE BUREAU,
Washington, D. C.

Received July 21, 1924. H. M. M.
Form No. 7782.
Form approved by Comptroller General U. S. March 21, 1922.

NOTICE OF INTEREST ALLOWANCE

49734.

Claim No. 118905 : District 2–Texas : Date of (schedule) allowance October 11, 1923. Schedule I. T. A–7264; Item IT: Ad: R: CC: ECW.

MAGNOLIA PETROLEUM CO.,
Dallas, Texas.

SIRS: Reference is made to your claim filed in connection with an overpayment of ______ corporation income ________ tax erroneously or illegally collected for the _______ year 1916 __________, which has been allowed by the refund of $105,571.95 __________ credit of $______.

Under sec. 1324(a) of the revenue act of 1921, interest in the amount of $19,171.21 is payable on $22,360.22 from December 18, 1918, and on $85,853.32 from March 20, 1921 (six months after the date of filing claim), to October 11, 1923 (the date of allowance of the claim). No interest is allowable on the balance because that portion of the refund was not allowed on the bases of claims.

A check by the disbursing clerk of the department for the amount of such interest is inclosed herewith.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

The notice of interest allowance for the year 1917 was in words and figures as follows:

TREASURY DEPARTMENT,
INTERNAL REVENUE BUREAU,
Washington.

Received July 21, 1924. H. M. M.
Form No. 7782.
Approved by Comptroller General U. S., March 21, 1922.

NOTICE OF INTEREST ALLOWANCE

Claim No. 128432 : District 2–Texas : date of (schedule) allowance October 11, 1923. Schedule I. T. A–7264; Item IT: AD: R: CC: ECW.
Received July 21, 1924. G. L. J.

MAGNOLIA PETROLEUM CO.,
Dallas, Texas.

SIRS: Reference is made to your claim filed in connection with an overpayment of ______ corporation income ______ tax erroneously or illegally collected for the ______ year

1917 __________, which has been allowed by the refund of $1,131,075.86 __________ credit of $______.

Under sec. 1324(a) of the revenue act of 1921, interest in the amount of $16,197.84 is payable on $105,556.34 from March 20, 1921 (six months after date claim was filed), to October 11, 1923 (the date of allowance of the claim). No interest is allowable on the balance as that portion of the refund was not allowed on the basis of the claim.

A check by the disbursing clerk of the department for the amount of such interest is inclosed herewith.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

XVIII. Plaintiff made an indorsement on the back of the aforesaid Treasury warrant in the amount of $35,369.05 as follows:

"Indorsement of this warrant for interest on account of refund of internal revenue taxes erroneously collected in the years 1916 and 1917 and the acceptance of the proceeds thereof are solely upon the condition that by doing so the Magnolia Petroleum Company in nowise waives, modifies, or restricts its rights to further claim in the Treasury Department and/or to institute suit in the courts for the recovery of the balance of interest which said company claims it is entitled to under the law, as set forth in printed brief heretofore filed in the office of Commissioner of Internal Revenue on the 23d of February, 1924."

The above-mentioned warrant was paid by the United States bearing the above indorsement thereon.

XIX. "Regulations No. 33 (revised) governing the collection of the income tax imposed by the act of September 8, 1916, as amended by act of October 3, 1917," promulgated January 2, 1918, were vague and ambiguous, especially in reference to depletion, inventories, and depreciation so that it was impossible for plaintiff when it filed its first amended return on May 27, 1918, to correctly calculate the amount of depletion and depreciation deductions to which plaintiff was entitled under the law and it was likewise impossible for plaintiff, because of the aforesaid conditions of said regulations, to correctly calculate its opening and closing inventories and the conditions aforesaid continued up to and subsequent to the date of payment of said tax for said year.

XX. It had been for many years the consistent practice of the Bureau of Internal Revenue, where claims were filed within the statutory period, for taxpayers to amend their claims by asserting new grounds for refund and such amendments were accepted regardless of whether the statutory period within which claim might have been filed had expired or not. However, the amount claimed could not, under such practice, be increased by amendment. This unbroken practice of the bureau continued until partially modified by the action of the Commissioner of Internal Revenue by his letter to plaintiff, dated January 18, 1924, and also partially modified by Law Opinion 1116, issued May 26, 1924, Internal Revenue Cumulative Bulletin III–1, page 350.

XXI. The Commissioner of Internal Revenue declined and refused and still declines and refuses to pay to plaintiff interest upon the refund of $1,236,647.81 made on November 22, 1923, in excess of the interest which he paid plaintiff thereon on July 18, 1924, in the amount of $35,369.05.

XXII. No action upon this claim, other than that hereinbefore set forth, has been taken before the Congress or any of the departments of the Government.

The court decided that plaintiff was entitled to recover interest at the rate of 6 per cent per annum to October 11, 1923, on $95,799.09 from June 14, 1917, on $9,772.86 from August 7, 1917, and on $1,131,075.86 from June 15, 1918, less $35,369.05 paid to the plaintiff July 18, 1924, which leaves the amount of recovery $365,799.42.

MOSS, *Judge*, delivered the opinion of the court:

On June 17, 1918, plaintiff, the Magnolia Petroleum Co., filed a claim for a refund of income taxes paid for the year 1916 in the sum of $30,217.11. On September 20, 1920, it filed a supplemental claim for the refund of taxes for the same year in the sum of $114,565.44 "or such greater amount as may be refundable." On June 12, 1920, plaintiff filed claim for the refund of $1,966,600.87 paid on account of its income tax for the year 1917, and on September 20, 1920, it filed a supplemental refund claim on account of the same year for the sum of $1,005,519.42, "or such greater

amount as may be legally refundable." On October 8, 1923, plaintiff's claim for the refund of $114,565.44 for the year 1916 was allowed for $105,571.95 and was rejected for the sum of $8,993.49; the claim for the refund of $30,217.11 for the same year was rejected in full; the claim for the refund of $1,966,600.87 on account of the 1917 taxes was allowed for $1,131,075.86, and was rejected for $835,525.01; and the claim for $1,005,519.42 for the same year was rejected in full. On November 19, 1923, plaintiff received certificates of overassessment in respect of the year 1916 in the amount of $105,571.95, and for the year 1917 in the sum of $1,131,075.86, and these certificates were accompanied by Treasury warrants for the total amount, $1,236,647.81. The letter of the Commissioner of Internal Revenue transmitting the payments contained the statement "interest status will be determined as soon as necessary data can be assembled."

After certain negotiations between plaintiff and representatives of the Internal Revenue Bureau on the question of interest plaintiff was allowed, and there was paid to it, the sum of $19,171.21 on the refund for 1916 and $16,197.84 on the refund of 1917, a total of $35,369.05 on the refund of $1,236,647.81.

Plaintiff contends that it was entitled to receive the sum of $365,964.54 as interest on the allowance of refund. This suit is for the recovery of that amount.

The right of taxpayers to receive interest on amounts refunded as illegal or erroneous collections was first recognized and provided for by section 1324(a) of the revenue act of 1921, approved November 23, 1921 (42 Stat. 227), which reads as follows:

"That upon the allowance of a claim for the refund of or credit for internal-revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) If such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment from the time such additional tax was paid, or (3) if no protest was made and the tax was not paid pursuant

to an additional assessment from six months after the date of filing such claim for refund or credit. The term ' additional assessment ' as used in this section means a further assessment for a tax of the same character previously paid in part."

By the same act section 177 of the Judicial Code was amended to read as follows:

" No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the revenue act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or any sum which was excessive or in any manner wrongfully collected under the internal revenue laws."

The above act was followed by the revenue act of 1924, approved June 2, 1924, 43 Stat. 253, section 1019 of which contains the following provision:

" Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term ' additional assessment ' as used in this section means a further assessment for a tax of the same character previously paid in part." 43 Stat. 346.

By the act of 1924, section 177 of the Judicial Code as amended was reenacted without change.

By the terms of section 1116 of the revenue act of 1926, 44 Stat. 119, the essential provisions of the act of 1924 were reenacted.

It is the contention of the Government that the applicable statutes for the determination of this case are sections 250(b), 252, and 1324(a) of the act of 1921.

Section 250(b) of that act, 42 Stat. 264, reads as follows:

"As soon as practicable after the return is filed the commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252."

Section 252, 42 Stat. 268, provides—

"That if, upon the examination of any return * * * it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits tax, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer * * *."

These two sections have no connection whatever with a claim for refund, but are intended to relate to mistake in overpayment by the taxpayer appearing on the face of the return itself, discoverable by the examination provided for in section 250(b), directing the proper credit of such excess payment to taxes due by the taxpayer under any other return, "and any balance of such excess shall be *immediately* refunded to the taxpayer." They are based upon the correct theory that in the event of an overpayment of taxes by mistake, immediately discovered and corrected, the taxpayer should not be entitled to interest. But that is not the case here. In 1918 plaintiff filed claims for refund. These claims were pending and under investigation for five years or more when the commissioner made an allowance of refund amounting in the aggregate to $1,236,647.81, but denied interest on certain items included in the total amount refunded on the ground, as stated in a letter to plaintiff, that "interest is not allowable upon any amount allowed, other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act without reference to a claim having been filed."

In the enactment of the various statutes on the subject it must have been the general purpose of Congress to save the taxpayer from whom taxes have been illegally or erroneously collected from all loss by paying interest on the amount refunded during the whole time the money was illegally retained by the Government. No interest is provided under section 252, for the simple reason that the excess payment is immediately refunded, and there is consequently no loss to the taxpayer.

Such a situation is in no sense analogous to the case of a taxpayer whose excess payment was retained by the Government for more than five years and was finally discovered in an investigation resulting from the filing of a formal claim for refund.

It is, however, the opinion of the court that the allowance of interest in this case is controlled by the revenue act of 1924. Under this view of the case it will not be necessary to determine the question as to the sufficiency of the protest filed with the payment of the 1917 taxes.

Except in certain particulars not important to the question involved the act of 1924 became effective upon its enactment, the necessary effect of which was to repeal section 1324(a) of the act of 1921. Section 1019 of the act of 1924 eliminated the hard provisions of the earlier act. Under its terms the allowance of interest was not made to depend on the filing and the allowance of a formal claim, nor does it require that the tax shall be paid under protest. It provided, without restriction or condition, for the allowance of interest on amounts refunded at the rate of 6 per cent per annum to the date of the allowance of the refund. It was not amendatory, in a strict sense, of the act of 1921. It was a substitution of the latter statute for the former, and it was effective on and after June 2, 1924. The final determination and allowance and also the payment of interest occurred after the act of 1924 became effective, at which time the sole existing provision of law for the payment of interest on refunds was that contained in section 1019 of the act of 1924.

It is therefore the opinion of the court that plaintiff is entitled to interest at the rate of 6 per cent per annum on

the whole amount of the refund as calculated in the findings herein, amounting to the sum of $365,799.42, and it is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

FRANK P. BLAIR v. THE UNITED STATES [1]

[No. E-426. Decided February 14, 1927]

On the Proofs

Income tax; dividend; profits in taxable year sufficient to pay dividend; net loss during corporate existence.—Where there were earnings or profits available in the taxable year 1918 sufficient at the time to pay a dividend declared and distributed by a corporation in said year the distribution is income for that year in the hands of the stockholders, notwithstanding the corporation has had a loss in excess of its gains for the period of its corporate existence as well as for the period from March 1, 1913, to the end of the said taxable year.

The Reporter's statement of the case:

Messrs. James B. Westcott and *W. Warfield Ross* for the plaintiff. *Good, Childs, Bobb & Westcott* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Shoal Creek Coal Company, hereinafter referred to as the "corporation," was incorporated under the laws of the State of Maine on March 20, 1905, with an authorized capital of $1,000,000, represented by 10,000 shares of common stock at the par value of $100 per share; said stock was paid in by a transfer to the corporation of all the assets of a corporation known as the Illinois & Eastern Coal Company, of which latter corporation the plaintiff was one of the stockholders. The principal office of the Shoal Creek Coal Company was, from and after the date of its incorporation and until after December 31, 1918, in Chicago, Ill.

[1] Writ of certiorari denied.

Reporter's Statement of the Case

II. Frank P. Blair, the plaintiff in this cause, was the president of the Shoal Creek Coal Company, and a large stockholder therein, owning at all times, during the year 1918, 9,550 shares of stock of said corporation.

III. On April 1, 1905, the corporation authorized an issue of first mortgage bonds in the sum of $1,000,000, said bonds bearing date April 1, 1905, and bearing interest at the rate of 5 per cent per annum. Said bonds were secured by a trust deed to the American Trust & Savings Bank of Chicago, Illinois, as trustee. There was issued $710,000 par value of said bonds, which were sold at a discount of $247,000, as shown by the report of the revenue agent who examined the books and records of the corporation, and which report is dated October 11, 1922, there being paid into the treasury of the company from the sale of said bonds the sum of $463,000.

IV. During the early years of the existence of the corporation it was under a heavy expense in the development of its mine. In order to aid the corporation, its stockholders, who were also its sole bondholders, surrendered prior to December 31, 1912, said first mortgage bonds and the accrued interest thereon to the corporation in the total sum, including principal and interest, of $546,460.51, which amount was credited to the surplus account of the corporation. No consideration was paid by the corporation to the holders for the bonds so surrendered, and said bonds and interest coupons thereon were canceled.

V. During the period from the organization of the corporation to February 28, 1913, the corporation incurred operating losses amounting to $440,000; during the same period the bondholders of the corporation (who were also its sole stockholders) surrendered for cancellation without consideration bonds and interest coupons amounting to $546,460.51. The losses above stated were charged against the surplus account of the corporation on the corporate books, and the bonds and interest coupons so surrendered were credited to the surplus account of the corporation on the corporate books.

VI. The net earnings of the corporation from March 1, 1913, to December 31, 1918, were as follows:

Reporter's Statement of the Case

For a period of 10 months (Mar. 1, 1913, to Dec. 31, 1913) (loss)	$37,091.66	
Year ending Dec. 31, 1914 (loss)	74,126.20	
Year ending Dec. 31, 1915 (loss)	46,630.33	
Year ending Dec. 31, 1916 (gain)		$7,087.37
Year ending Dec. 31, 1917 (gain)		44,698.03
Year ending Dec. 31, 1918 (gain)		84,868.39
	157,848.19	136,653.79

VII. On December 17, 1918, the following resolution was passed by the board of directors of the corporation:

"*Resolved*, that a dividend be and the same is hereby declared, payable to the stockholders of record as of this date, December 17, 1918, in the sum of 8% per share; upon common stock of this corporation payable 6% immediately, and 2% when in the opinion of the treasurer funds are available for that purpose."

VIII. Pursuant to the above resolution, the plaintiff, owning 9,550 shares of the stock of said corporation, received on December 20, 1918, the sum of $75,000, and on December 31, 1918, $1,400, or a total of $76,400.

IX. The plaintiff, Frank P. Blair, filed his income-tax return for the year 1918, on March 13, 1919; in said return the said plaintiff reported the amount of $76,400 received by him from the corporation as a taxable dividend, paying an income tax for the year 1918, amounting to $21,833.42, as follows:

Mar. 13, 1919	$5,528.63
June 13, 1919	5,387.04
Sept. 13, 1919	5,458.36
Dec. 12, 1919	5,458.36
Feb. 24, 1920	1.03
Total	21,833.42

X. On review and final audit the Commissioner of Internal Revenue computed the earnings available for dividends, as follows:

Surplus, Mar. 1, 1913		$106,460.51
Earnings (losses) Mar. 1 to Dec. 31, 1913	$37,091.66	
Earnings (losses) 1914	74,126.20	
Earnings (losses) 1915	46,630.33	
		157,848.19

Reporter's Statement of the Case

Deficit Dec. 31, 1915		$51, 387. 68
Earnings 1916	$7, 087. 37	
Earnings 1917	44, 698. 03	
Earnings 1918	84, 868. 39	
		136, 653. 79
Earnings accumulated subsequent to Feb. 28, 1913		85, 266. 11
December, 1918, dividend paid		80, 000. 00
Balance of earnings accumulated subsequent to Feb. 28, 1913		5, 266. 11

XI. If said amount of $76,400 were excluded from the plaintiff's taxable income for the year 1918, the amount of plaintiff's income-tax liability for said year would have been $2,044.74. The difference between this sum and the amount of tax paid by plaintiff is $19,788.68.

XII. On April 12, 1921, the plaintiff filed with the Commissioner of Internal Revenue his claim for refund for said sum of $19,788.68, wherein plaintiff made the following statement:

"On December 31, 1918, the Shoal Creek Coal Company, Chicago, Illinois, made a distribution, of which I received $76,400.00, which amount was erroneously reported on my return as a dividend and tax paid accordingly. This distribution was in fact a distribution of capital assets, and therefore not taxable, inasmuch as such amount was less than cost on March 1, 1913, value of stock held.

"Balance sheet of the Shoal Creek Coal Company as at December 31, 1917, is submitted herewith, showing deficit as at that date of $548,379.92. Inasmuch as earnings for the year 1918, $84,868.39, did not equal deficit as at December 31, 1917, but only slightly reduced such deficit, there was no surplus from which to pay a dividend, and it necessarily follows that distribution was made from capital assets and not from surplus. No dividend has ever been paid nor distribution made prior to December 31, 1918, by the Shoal Creek Coal Company. Correct tax liability is as follows:

J—Total net income on which normal tax is to be calculated at 1918 rate	$16, 603. 92
L—Total net income subject to surtax	16, 603. 92
25—$16, 603. 92.	
26— 1, 000. 00	
15, 603. 92	
4, 000. 92 @ 6%	240. 00

Opinion of the Court

28—$11,603.92 @ 12%	$1,392.47
Surtax	452.27
	2,084.74
Less tax paid at source	40.00
Total tax	2,044.74
Tax paid on returns	21,833.42
Tax overpaid	19,788.68"

XIII. On January 16, 1924, the Commissioner of Internal Revenue denied plaintiff's claim for refund, holding that the distribution was taxable dividend, and on August 4, 1925, said Commissioner of Internal Revenue affirmed his former decision and denied said claim for refund.

XIV. This claim arises under the revenue act of 1918, and the regulations adopted by the Treasury Department of the United States relative thereto.

XV. The report of the internal revenue agent who examined the books and records of the Shoal Creek Coal Company, which report is dated October 11, 1922, treated the surrender and cancellation of the bonds and interest coupons as "paid-in surplus" for the purpose of computing invested capital of the corporation for excess-profits tax purposes and the balance sheet of the corporation as prepared by the internal revenue agent set up the surplus items as of February 28, 1913, as follows:

Surplus (loss)	$450,968.64
Paid-in surplus	546,460.51

XVI. The Commissioner of Internal Revenue in computing the excess-profits tax due from the Shoal Creek Coal Company also treated and considered the surrender and cancellation of the said bonds and interest coupons as "paid-in surplus."

The court decided that plaintiff was not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The plaintiff sues to recover income taxes paid which the Commissioner of Internal Revenue refused, upon plaintiff's application therefor, to refund to him. The facts are stipulated and it appears from them that plaintiff was the prin-

cipal stockholder in a coal company incorporated in 1905 with an authorized capital of $1,000,000, divided into 10,000 shares of common stock of the par value of $100 each, of which stock plaintiff owned 9,550 shares. The stock was paid for by the transfer to the corporation of the assets of another corporation. The corporation issued its bonds to the amount of $710,000, upon which it realized $463,000, which went into its treasury. During the early years of its existence the corporation incurred heavy expenses in development, and its stockholders, who were also its sole bondholders, surrendered prior to December 31, 1912, bonds and accrued interest to the amount of $540,460.51, which was credited to its surplus account. During the period from its organization to February 28, 1913, the corporation's operating losses amounted to $440,000, which were charged against the surplus account on its books. For the balance of the year 1913, and the years 1914 and 1915, the operations showed a net loss of approximately $157,000, and during the years 1916, 1917, and 1918 there were gains of approximately $136,000.

On December 17, 1918, the directors declared a dividend of 8 per cent on the common stock, 6 per cent payable at once and 2 per cent when, in the opinion of the treasurer, funds were available for the purpose. Plaintiff accordingly received on his 9,550 shares 8 per cent, amounting to $75,000, received December 20, and $1,400 received December 31, 1918, a total of $76,400. Plaintiff in his income-tax return reported this amount as received by him during 1918 from the corporation as a taxable dividend paying an income tax for the year 1918 in the sum of $21,833.42. If the $76,400 be not taxable his tax for that year would be $19,788.68 less than he paid. In April, 1921, plaintiff applied to the commissioner for a refund of this last-named amount, claiming that in his return he had erroneously reported as a dividend, and paid tax upon the amount received from the corporation during 1918, $76,400.

The question for decision as stated by plaintiff's counsel is: "Where a corporation has a loss in excess of its gains for the period of its corporate existence, as well as for the period from March 1, 1913, to December 31, 1918, is a dis-

tribution of corporate funds to the stockholders in 1918 a taxable dividend within the meaning of the revenue act of 1918, or is such distribution a return of capital and therefore not taxable?" More directly, however, the question is whether the amount received by the plaintiff in 1918 from the corporation was a part of his income for that year. The corporation had gains in three years, 1916, 1917, and 1918. It had gains in 1918 of $84,000. It declared an 8 per cent dividend to its stockholders in December, 1918. It was paid to and received by them, the plaintiff receiving his proportion and keeping it. That it increased his income by that much there can be no question. It was a dividend within the meaning of section 201 of the revenue act of 1918, subdivision (a) and (e), 40 Stat. 1059. It was a distribution out of its earnings or profits in 1918. If it be concluded that the corporation had the right to withhold distribution and apply the earnings to make up its losses during prior years it did not exercise that right, and the plaintiff is in no position to complain of its action. He was properly taxable on the dividend as part of his income. See *Edwards* v. *Douglas*, 269 U. S. 204; *Adams case*, 60 C. Cls. 319. The petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

AIR NITRATES CORPORATION v. THE UNITED STATES

[No. D-889. Decided February 21, 1927]

On the Proofs

Pleading; submission of cases; definite stipulations.—Where in a stipulation of facts, the parties thereto seek to agree upon the amount due the plaintiff if entitled to recover, the agreement as to the amount should be stated with certainty.

The Reporter's statement of the case:

Mr. Charles E. Hughes for the plaintiff. *Mr. H. H. Shelton* was on the brief.

Messrs. Dwight E. Rorer and *Assistant Attorney General Herman J. Galloway* for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Air Nitrates Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York, with executive office at 511 Fifth Avenue, New York City, New York.

II. On or about August 14, 1918, the plaintiff, acting by and through its duly authorized officers, and the defendant, acting by and through Colonel Samuel McRoberts, Ordnance Department, United States Army, and under the direction of the Secretary of War, entered into a contract in writing wherein the plaintiff was appointed and agreed to act as the sole and exclusive agent of the defendant for the following purposes:

(a) To design, construct, and operate ammonium nitrate plants, as follows: (1) A plant at Muscle Shoals, Alabama, having an approximate capacity of 110,000 short tons of ammonium nitrate per annum; (2) a plant at Toledo, Ohio, and one at Cincinnati, Ohio, each having an approximate capacity of 55,000 short tons of ammonium nitrate per annum.

(b) To carry out the terms and conditions of the contract marked Exhibit "A," and in so doing to maintain such departments, including engineering, administrative, purchasing, construction, manufacturing, inspection, labor relation, workmen's compensation, statistical, commissary, police, fire, medical, housing, accounting, and legal, as might be necessary for such purpose.

(c) To operate such plants and to continue the operation thereof up to June 1st, 1921 (or as long thereafter as the war continued), when and as any part or parts of said plants, or any of them, was sufficiently completed and ready for operation, and to do all things necessary or proper in and about the operation of said plants, including the employment of all necessary labor and power and the purchase of all necessary materials.

III. A copy of the contract between the plaintiff and the defendant, together with Schedule "A" thereof, is attached to plaintiff's petition as Exhibit "A," and a copy of the license agreement between the American Cyanamid Company and the defendant, together with Schedule "B"

thereof, is attached to plaintiff's petition as Exhibit "I," and are both made part of these findings by reference thereto.

IV. Under and in accordance with the said contract between plaintiff and defendant, the plaintiff designed, constructed, completed, and placed in operation a nitrate plant at Muscle Shoals, Alabama; it designed and began the construction of a nitrate plant, one each at Cincinnati, Ohio, and Toledo, Ohio, and had partially completed the said two plants upon the signing of the armistice on November 11, 1918.

All activities looking toward the completion of the plants at Cincinnati and Toledo were stopped on November 12, 1918, by order of the construction division of the Ordnance Department of the United States Army. The plant at Muscle Shoals was completed, and the Air Nitrates Corporation was notified that all activities at that plant would be terminated as of June 1, 1920.

V. Under Article XI, subdivision 1, of said contract, the defendant agreed to pay to the plaintiff a construction fee as follows:

"Three and one-third (3⅓) per cent of the cost in connection with the construction and equipment of the said plants, until such cost (exclusive of the agent's compensation) shall equal thirty million (30,000,000) dollars, and thereafter one and two-thirds (1⅔) per cent of such cost in excess of said thirty million (30,000,000) dollars. Said fee shall be payable monthly upon that portion of the cost for which payment has been made during the month or months preceding and as to which the fee is unpaid * * *. The total of the construction fee shall not exceed one million five hundred thousand ($1,500,000) dollars."

The cost of the construction and equipment of all said plants was in excess of $30,000,000, and not less than the sum of $82,070,000.

The defendant has paid the plaintiff (at the rate stated in Article XI of the contract) the sum of $1,144,211.61 on account of said construction fee, and there is a balance of $355,788.39 which has never been paid by the defendant to the plaintiff, or any part of same. The said sum of $355,-788.39, if added to the sum of $1,144,211.61, will equal the

sum of $1,500,000, the total construction fee as stated in Article XI of the contract.

VI. Under Article XI, subdivision 2, of said contract, the defendant agreed to pay to the plaintiff an operation fee as follows:

"One-quarter of one cent ($0.0025) per pound of ammonium nitrate produced in compliance with Article VII hereof, and accepted or utilized by the United States, up to and including 110,000 tons produced in any fiscal year of the United States, and one-eighth of one cent ($0.00125) per pound of ammonium nitrate so produced and accepted or utilized in any said fiscal year, in excess of such 110,000 tons. Payment shall be made monthly."

Plaintiff in accordance with the said contract began operating the said plant at Muscle Shoals, Alabama, on the 25th day of November, 1918, and continued operating the same for approximately four months thereafter, during which time it produced 1,710.8 tons of ammonium nitrate, which was accepted or utilized by the defendant. The operation fee, at the said rate stated, amounts to the sum of $8,554.00, no part of which has been paid by the defendant to the plaintiff.

VII. The sum of $47,044.10 is the amount agreed upon between the parties as having been expended by the plaintiff in payment of costs incurred by it, as provided in Article X, in its performance of said contract. No part of the $47,-044.10 has been paid by the defendant to the plaintiff.

VIII. The plaintiff duly presented to the Chief of Ordnance of the United States Army for payment bills for the balance due on the construction fee, the balance due on the operation fee, and for other amounts then claimed by it to be unrecouped refundable expenses, under said contract, including, among others, the items herein above referred to, but payment thereof was not made. Thereafter the plaintiff presented to the Secretary of War for payment its said claims for the balance due on the construction fee and the balance due on the operation fee and for a reduced amount for such unrecouped refundable expenses, including, among others, the items herein above referred to, but under date of May 2, 1923, such payment was refused

by the Acting Secretary of War. Thereafter the plaintiff began this action in this court, praying judgment in the sum of six hundred eight thousand two hundred forty-eight dollars and seventy-nine cents ($608,248.79), with interest thereon, embracing not only the items set forth in these findings, but all items for which bills had been presented as aforesaid to the Chief of Ordnance. Thereupon the plaintiff's said claims were referred to the Department of Justice, which made an investigation of the same in consultation with the War Department. As a result of such investigation conferences were held between representatives of the Department of Justice and the War Department of the United States and representatives of the plaintiff, during the course of which a proposed stipulation of facts setting forth the same items as are embraced in these findings of facts (with the exception that there was included in said proposed stipulation an item of $5,260.28, which is not included in these findings) was prepared and submitted to the War Department. On November 19, 1925, the Acting Secretary of War wrote to the Attorney General of the United States as follows:

WAR DEPARTMENT,
Washington, Nov. 19, 1925.

The honorable the ATTORNEY GENERAL.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to your letter of November 16th, 1925, and its enclosure, a proposed stipulation as to facts submitted by plaintiff in the case of *Air Nitrates Corporation* v. *The United States*, Court of Claims No. D–889.

I have considered the proposed stipulation of facts and believe that it would be to the best interests of the Government to enter into such a stipulation in the sum of $416,646.77, as proposed by the plaintiff.

I feel that the War Department has no counterclaim which can be proved against plaintiff on account of the construction and/or operation of the plants under the contract. This matter has been under consideration by the War Department for a number of years. Proof has not been obtained which would justify the filing of an affirmative counterclaim for any sum, and I understand that the Department of Justice has obtained no additional information. In view of the years which have passed since the transac-

tions in question, the position of the Government in court proceedings becomes more difficult, and I believe it is to its benefit to terminate this litigation on the present advantageous terms.

Very truly yours,

(Signed) HANFORD MACNIDER,
Acting Secretary of War.

Thereafter there was further correspondence between the War Department and the Department of Justice, as a result of which the Secretary of War on April 12, 1926, wrote to the Attorney General as follows:

WAR DEPARTMENT,
Washington, April 12, 1926.

The honorable the ATTORNEY GENERAL.

DEAR MR. ATTORNEY GENERAL: Replying to your letter of March 27th, 1926, concerning the case of *Air Nitrates Corporation* v. *The United States* (Court of Claims No. D-889) and the proposed stipulation in connection therewith submitted with your letter of February 27, 1926, to this office, it is understood that the particular advice required is that connected with paragraph 7 of the stipulation, and the item of $52,504.38 (refundable expenses) of paragraph 9. All other matters contained in the stipulation are apparently verified by official reports of the Ordnance Department and other documents contained in the file.

You are advised that an examination of the records of the Air Nitrates Corporation shows that of the item of $52,504.38 (refundable expenses) certain sums amounting to $5,260.28 are not, in the opinion of this office, within the intent of the proposed stipulation and should be deducted; that when so deducted there will remain items of refundable expenses aggregating $47,044.10 which are true and within the intent of the proposed stipulation.

The items of $355,788.39, unpaid construction fee, and $8,554.00, unpaid operation fee, which appear in the official report of the Ordnance Department, were found to correspond with unpaid vouchers for like amounts retained by the Air Nitrates Corporation.

The above three items make up the total sum which this office considers may be correctly incorporated in the proposed stipulation and are summarized as follows:

Opinion of the Court

Unpaid construction fee	$355,788.39
Unpaid operation fee	8,554.00
Refundable expenses	47,044.10
	411,386.49

Report of the technical advisor on accounting of the Judge Advocate General, setting out in detail the item of $47,044.10, is transmitted herewith.

There is also transmitted the file in connection with the case.

Sincerely yours,
(Signed) DWIGHT F. DAVIS,
Secretary of War.

IX. The amount of the money unrecouped by plaintiff under said contract is therefore composed of the following items:

Balance construction fee	$355,788.39
Operating fee	8,554.00
Refundable expenses	47,044.10
	411,386.49

The court decided that plaintiff was entitled to recover $411,386.49.

Per curiam: This case was submitted originally upon a "stipulation as to facts" and was remanded for a definite stipulation if one was desired. The case is again submitted upon a stipulation signed by the Attorney General and attorneys for the plaintiff. In this second stipulation the parties agree upon an item that was indefinite in the first stipulation. It is desirable where parties seek to stipulate the amounts that the agreement should be definite as to these amounts. The present stipulation meets this condition. No counterclaim has been filed, and upon inquiry at the time of submission the attorney for the Government stated that it interposed no defense.

Judgment is therefore awarded in accordance with the stipulation.

Reporter's Statement of the Case

GEORGE LEARY CONSTRUCTION CO. v. THE UNITED STATES

[No. D-39. Decided February 23, 1927]

On the Proofs

Contract; increase in wages; decision of bureau; finality.—Where a Government contract provides that all questions growing out of a claim for additional compensation on account of increase in wages "shall be determined by the Navy Department, Bureau of Yards and Docks, whose decision thereon shall be final and conclusive," and in the consideration of such a claim the said bureau disallows as wages a cash outlay for subsistence of men employed by the contractor, the disallowance is final and conclusive.

Same; payment by subcontractor of wage increase; right of contractor to reimbursement.—Where, under the terms of a contract the Government agrees to pay additional compensation on account of necessary increase in wages of labor employed upon the work contracted for, and a subcontractor pays such an increase, the contractor, in order to entitle it to the additional compensation arising out of the wage increase, does not have to establish the fact that it has paid the same to the subcontractor.

Same; prevention of work by the Government; refusal thereafter of contractor to continue.—The Government can not insist upon the completion of contract work which, for its own convenience, it prevents until long after the time fixed for performance has expired, and the contractor may thereafter refuse to continue the work, without responding in damages.

The Reporter's statement of the case:

Messrs. James D. Carpenter, jr., and *William B. King* for the plaintiff. *Mr. George R. Shields* and *King & King* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant. *Mr. Howard W. Ameli* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation duly organized under the laws of the State of Delaware, with its principal office and place of business in New York City, in the State of New York, and prior to and during the years 1917 and 1918 was the

owner of certain hydraulic dredges and engaged in the dredging business.

II. On December 12, 1917, plaintiff, acting through its vice president and secretary, Fred H. Schomburg, entered into a written contract with the defendant, represented by and acting through F. D. Roosevelt, Acting Secretary of the Navy, contracting officer, to furnish all labor and material and do certain dredging and filling in certain specified areas at the naval operating base, Hampton Roads, Va. A copy of the contract and the specifications forming a part thereof are attached to the petition, marked "Plaintiff's Exhibit A," and are by reference made a part of these findings. Said contract was designated and known as No. 2690, and the several items of work to be performed were embraced in items 13, 14, 15, and 16 of paragraph 150 of the specifications attached to and forming part of said contract.

III. The several items of work contemplated by and included in the contract were to have been completed within the following specified periods of time:

The filling of area B, within 225 calendar days;

The filing of area C within 60 calendar days;

The filling of area D, within 60 calendar days;

And the dredging of a channel and berths for a merchandise pier, within 150 calendar days, from the date a copy of this contract is delivered to the party of the first part.

The prices for the work to be performed were as follows:

For filling in area B, the sum of 23 cents per cubic yard, measured in place in the area from which the material is dredged;

For filling in area C, the sum of 27 cents per cubic yard, measured in place in the area from which the material is dredged;

For filling in area D, the sum of 27 cents per cubic yard, measured in place in the area from which the material is dredged;

And for dredging a channel and berths for a merchandise pier, the sum of 23 cents per cubic yard of material dredged, measured in place in the area from which the material is dredged.

Reporter's Statement of the Case

Copy of the contract was delivered to plaintiff December 15, 1917.

IV. Paragraph 2 of the contract, relating to adjustment of wages, provides as follows:

"If, after the date of the contract, there shall be any increase in the rates of wages prevailing in the vicinity of a place where work contemplated by the contract is done that shall necessitate payment by the contractor, on account of labor employed exclusively upon such work, of rates of wages in excess of those prevailing in such vicinity at the date of the contract, he shall receive additional compensation in a sum equal to one-half the amount of the increase in the rates of wages so required to be paid by him over the rates prevailing at the date of the contract: *Provided*, That in determining such additional compensation wages paid by the contractor at any time during the continuance of the contract in excess of the rates prevailing in the vicinity at the time of such payment shall be disregarded to the extent of such excess: *And provided further*, That any increase over wage rates prevailing at the date of the contract before being granted by the contractor shall be notified to and approved in writing by the Bureau of Yards and Docks. For the purposes of this paragraph, rates of wages prevailing in the vicinity of a place where work contemplated by the contract is done shall be understood to mean the established rates of wages in the nearest navy yard, or station, if there be one within 50 miles of such place, or, if there be none within that distance, the rates of wages paid under a well-established wage scale, if any, in such vicinity, or, if there be none, such reasonable rates of wages as may be determined by the Navy Department, Bureau of Yards and Docks. The burden shall be upon the contractor of establishing to the complete satisfaction of the Bureau of Yards and Docks all facts upon which any claim for additional compensation hereunder shall rest, and all questions growing out of any such claim shall be determined by the Navy Department, Bureau of Yards and Docks, whose decision thereon shall be final and conclusive. Determination of such claims shall be deferred until the completion of the contract."

V. On July 31, 1918, plaintiff sublet a part of the work covered by contract No. 2690, to James Stewart & Company, by written contract of agreement bearing said date, which agreement provided in part as follows:

"And the contractor will also reimburse subcontractor to the amount of one-half of any increase in wages the sub-

contractor may be required to pay over and above the rates prevailing at the time the contract between the contractor and the United States was signed, if and when the contractor receives such reimbursement from the United States, provided such amount is not withheld by the United States because of anything growing out of its contract with the contractor. * * *

"It is mutually agreed that all the terms and conditions of the aforesaid contract between the contractor and the United States and specifications No. 2690 and general provisions annexed thereto are binding on both parties hereto so far as applicable, and that the monthly and final estimate of the engineer officer of the United States in charge of said work as to the sufficiency and quantity of work done shall be conclusive on both parties hereto."

VI. On October 4, 1918, contract No. 3513, between the Atlantic, Gulf & Pacific Company, a corporation organized and existing under the laws of West Virginia, the United States Government, and the George Leary Construction Company, the plaintiff herein, was entered into, by the terms of which certain hydraulic dredges, with necessary and complete equipment, owned by the Atlantic, Gulf & Pacific Company, were leased to the United States upon a per diem basis of compensation for work to be performed at the naval operating base, Hampton Roads, Va., which contract provides in part as follows:

"Whereas the lessee desires to secure dredging equipment sufficient to move prior to April 1, 1919, 8,000,000 cubic yards, more or less, of material in accordance with the plans for the construction of the naval operating base, Hampton Roads, Va., including the yardage covered by contract No. 2690, dated December 12, 1917, of the Leary Company with the lessee for certain dredging and filling at said naval operating base. * * *

"26. It is understood and agreed by and between the parties hereto that the work covered by said contract No. 2690 shall be carried on by the Leary Company and the lessor in such manner as not to interfere with each other. For work done by the Leary Company thereunder said company shall be paid in accordance with the terms thereof. For work covered by said contract No. 2690 performed by the lessor the lessor shall be paid in accordance with the terms of this contract. Upon the completion of the work covered by said contract No. 2690, if the cost to the Gov-

ernment thereof shall be greater than it would have been under said contract, the Leary Company will pay to the lessee the amount of such difference in cost; if said cost shall be less than it would have been under said contract, the lessee will pay to the Leary Company the amount of such difference in cost. Any adjustment between the lessee and the Leary Company will be made after the completion of the work by said contract No. 2690."

Area "D" is not included in this contract.

VII. The only question in controversy relates to the filling of area D and the adjustment of increased rates of wages arising under paragraph 2 of contract No. 2690, and also under the provisions of the subcontract providing for reimbursement of the subcontractor of one-half the amount of increased wages paid by it.

The time limit for filling area D was 60 calendar days from December 15, 1917. This area at the time the contract was entered into was low, wet land, partially covered with scrub brush, and could have been readily filled at that time had the Government not prevented the work from being done by the use of the area for storage and other purposes.

VIII. No attempt was made to fill area D within the time limit stated, or for several months thereafter. The Government used a part of this area for storage purposes and erected numerous temporary buildings thereon, including sidewalks. The buildings and walks were elevated a considerable distance above the general surface of the ground and rested on piers or other forms of temporary supports designated stilts.

IX. On May 28, 1919, the Chief of the Bureau of Yards and Docks addressed the following letter to plaintiff relative to filling area D:

"Dredging, naval operating base, contract 2690.

"GENTLEMEN: The bureau notes from reports received from the naval operating base from time to time that no steps have been taken by you toward the filling of area D.

"As the filling of area D is urgent, you are requested to proceed with its filling at the earliest possible moment.

"A reply is requested naming the date on which you anticipate completing this work."

X. On June 28, 1919, plaintiff addressed to Commander Duncan, public-works officer in charge, the following letter:

"Herewith you will find copy of a letter we are sending to the Bureau of Yards and Docks to-day.

"We took this matter up with Mr. Stewart and Mr. Franson, of James Stewart & Co., Inc., and they say the very lowest price which they can do this work for is 35¢ per cubic yard; we on our part are willing to quote this same price to the Government and have Stewart & Co. do this work without any profit to ourselves.

"In view of all circumstances and the fairness of our position in the matter we trust that you will see your way clear to close up the matter, and authorize the work to be done at 35¢.

"Anything you can do to expedite a decision from the bureau so that we can get this contract, 2690, completed and off our hands will be greatly appreciated."

XI. On August 18, 1919, Commander Duncan, public-works officer in charge, addressed to the plaintiff the following letter:

"Referring to your letter of August 12, 1919, in regard to the filling of area D, in which you refuse to proceed with the work of filling this area until the Government accepts your proposition to increase the cost from 27½¢ to 33¢ per cubic yard, your attention is invited to Bureau of Yards and Docks' letter of July 22, 1919, No. 2690, to you in regard to this matter, in which you were informed that 'You are hereby directed to proceed with the filling of area D in accordance with the terms and provisions of the contract.

"'Should you deem yourself entitled to additional compensation for this work, such claim therefor as you may submit upon its completion will have proper consideration.'

"Am I to understand from your letter of August 12 that you refuse to obey the instructions contained in the above quotation?

"I note that your subcontractors, the James Stewart Company, are now laying their pipe as though they intended proceeding with the work of filling area D. Please inform me if this is in accordance with your orders. An immediate reply is requested."

And on August 19, 1919, Commander Duncan addressed to plaintiff the following letter:

"Referring to your previous correspondence in regard to filling area D under your contract #2690, you are informed that due to your refusal to fill this area under the terms

of contract 2690 that same will be filled under the terms of contract #3513, you being charged the difference between the actual cost and your contract price under contract #2690 or paid the difference, as the case may be."

XII. Soon after the date of the foregoing letter, and in August, 1919, the hydraulic dredge *Tornado* and equipment, owned by James Stewart & Company, and which had been employed upon other parts of the work embraced in contract No. 2690 under a subcontract from plaintiff to the Stewart Company, were placed at work filling area D, and completed same in the late summer or early fall of 1919.

XIII. The cost of filling area D by the dredge *Tornado* was ascertained and determined on a per diem basis, as fixed in the triparty lease agreement between the Atlantic, Gulf & Pacific Company, the United States, and the George Leary Construction Company, referred to in Finding VII hereof. The amount is $4,937.74 more than the yardage cost thereof would have been at the price fixed for the filling of that particular area under contract No. 2690, and said amount was deducted and withheld from other funds due plaintiff.

On August 31, 1920, plaintiff wrote Admiral Parks, Chief of Bureau of Yards and Docks, relative to above matter, as follows:

"Subject: Voucher No. 1, final contract 3513, amount $8,783.72.

"Admiral: The public-works officer in this voucher charges us with a deficit of $4,937.74 for work done by the dredge *Tornado* in area D. We are not properly chargeable with this amount, because the area was materially changed by the Government after we entered into contract No. 2690, which included this work, and the area was not turned over to us until about two years after the time mentioned in the contract.

"In the meantime costs materially increased, and the changed conditions of the area through the construction of buildings, etc., made the work far more expensive than it would have been under the contract conditions. In our previous correspondence we have waived our legitimate claim for profit on the filling of area D, and we now respectfully request that a board be appointed to investigate this matter and report its finding to you.

"The voucher as now written makes it a final payment, and we respectfully request that the voucher be changed permitting payment to us of $8,783.72 pending the investigation of the board."

XIV. The dredging for the merchandise pier and certain other parts of the work connected therewith, and included in contract No. 2690, were performed by James Stewart & Company with its hydraulic dredge *Tornado* and complete equipment under the subcontract with plaintiff referred to in Finding VI hereof. There were substantial advances in the rates of wages paid by the subcontractor, during the performance of the work, over and above the rates prevailing at the time contract No. 2690 was entered into, which increases had been approved and authorized by the official board having control thereof. The amount of such increased wages so paid by the subcontractor was ascertained and determined from monthly statements furnished by it, which were checked, found correct, and approved under authority of the public-works officer. One-half of the amount of such increased wages was $9,047.69, for which reimbursement was demanded, but was withheld for the reason that it had not been shown that the plaintiff had reimbursed the subcontractor, and later reimbursement was refused on the ground that the Government was not liable therefor.

XV. Part of the work called for under contract No. 2690 was performed by the dredge *Conestoga*, owned and operated by plaintiff. This dredge was equipped with boarding and sleeping facilities for employees, and the plaintiff furnished subsistence to its men while employed at said work, the same representing and being part of the wages paid to them. There were substantial advances in rates of wages during the performance of the work over and above the rates prevailing at the time the contract in question was entered into, such increases having been authorized and approved by the board having control thereof. The amount of such increased wages paid by plaintiff was ascertained and determined, one-half of which amounted to $15,379.92.

Vouchers and pay rolls establishing such figures were furnished by plaintiff and examined and checked by defendant and found to be correct; $10,572.32 of the amount was ap-

proved, allowed, and paid by the Navy Department. The balance, $4,825.60, was disallowed on the ground that it represented the cost of subsistence furnished the men employed.

XVI. On November 12, 1919, G. A. Duncan, public-works officer, wrote plaintiff relative to furnishing certified pay rolls as follows:

"You are requested to furnish certified pay rolls and receipts for wages paid by your company on above-numbered specification. It will greatly assist matters if your representative would be present when checking of your rolls is in progress."

XVII. On April 26, 1920, Admiral C. W. Parks, Chief of the Bureau of Yards and Docks, wrote plaintiff relative to the claim for increased wages paid to the men on the dredge *Conestoga*, as follows:

"Subject: Contract 2690, dredging, naval operating base; claim for increased wages, dredge *Conestoga*.

"Reference: Your letter to public-works officer, Sept. 2, 1919.

"GENTLEMEN: The Bureau of Yards and Docks have returned the following decision, under date of April 21, 1920, concerning claim mentioned in subject:

"'1. Receipt is acknowledged of the above-referenced letter, which recommends payment to the contractor in the sum of $15,397.92 on account of increased wages, as provided by the second clause of the general provisions of specification No. 2690.

"'2. It is noted that the public-works officer, in determining this cost, has added one-half of the excess cost of subsistence over that prevailing at the date of contract, it being presented that the wages paid on the dredge *Conestoga* included board. By referring to the adjustment clause of the specification mentioned above it will be noted that there is nothing therein which contemplates the payment of subsistence. The recommendation, therefore, of the officer in charge on this item is disapproved.

"'3. The bureau, however, does approve, and therefore authorizes, payment to the contractor in the sum of $10,572.32, same being one-half of the increase in wages paid on the dredge *Conestoga* from January 1, 1918, to August 22, 1919.

"'4. It is believed that this amount is fully covered by existing allotments, as from recent advices from the base the

actual expenditures under allotments 8292–1–4 and 8205–5 will be considerably less than the amounts shown thereon.

"'(Signed) C. W. PARKS.'

"The amount of claim authorized in the foregoing decision, $10,572.32, will be placed in line for payment."

XVIII. On May 1, 1920, the public-works officer wrote plaintiff relative to the claim for increased wages paid to the men on the dredge *Tornado* as follows:

"Subject: Contract 2690; wage increases of subcontractor, claim.

"Reference:

(*a*) Your letter to public-works officer, dated April 5, 1920, with inclosed claim, covering one-half of increase in wages, dredge *Tornado*.

(*b*) Public-works officer's letter NOB–35359 of April 9, 1920.

(*c*) Recent telephone conversation, Mr. Schomburg (calling), Mr. Corry of this office (answering).

"GENTLEMEN: Conforming oral instructions, reference (*c*), and in accordance with Bureau of Yards and Docks ruling, hereinafter quoted, under date of July 31, 1919, on contract No. 3223 for extension to laboratory, naval operating base, Hampton Roads, Va., the same general provisions applying as on contract No. 2690, 'that the general contractor is in any case entitled to reimbursement on account of wage increases of subcontractors only after he has himself actually reimbursed them,' you are requested to furnish the public-works officer with a receipted bill showing that you have reimbursed the subcontractor, the James Stewart Company, for one-half of the amount of increase in wages paid in connection with the dredge *Tornado* while on contract No. 2690, amounting to $9,074.69, which claim was submitted in detail with reference (*a*).

"Your early compliance with the above request will operate to expedite the forwarding of claim to Bureau of Yards and Docks for decision."

XIX. On May 5, 1920, plaintiff wrote the public-works officer relative to reimbursing the subcontractor, James Stewart & Company, as follows:

"We wish to file our objection to applying the ruling of the Bureau of Yards and Docks under date of July 31st, 1919, contract #3223, in reimbursing subcontractor for one-half wage increases.

"Under the contract between James Stewart & Company and ourselves dated July 31st, 1918, and which was filed

with you, the latter part of paragraph 5 reads 'and the contractor (George Leary Construction Company) will reimburse the subcontractor (James Stewart & Co., Inc.) to the amount of one-half of increase in wages the subcontractor may be required to pay over and above the rates prevailing at the time the contract between the contractor and the United States was signed, if and when the contractor receives such reimbursement from the United States.'

"In accordance with this paragraph we are awaiting reimbursement from you.

"The detailed claim of James Stewart & Co., Inc. (subcontractor) having previously been filed with you, amounting to $9,074.69.

"In view of all of the facts set forth in the contracts, #2690, with the Government and subcontract with James Stewart & Company, Inc., dated July 31st, 1918, terms and conditions thereof, the Government may not now properly withhold the claim due James Stewart & Company, Inc.

"The above explains the situation, and we believe you will see that the Government should pay us the amount due, $9,074.69, so that we may reimburse James Stewart & Company, Inc."

XX. On June 12, 1920, the Chief of the Bureau of Yards and Docks wrote plaintiff relative to the question of increased wages, as follows:

"Subject: Contract 2690; claim for increase in wages, dredge *Tornado*.

"References:

(*a*) Your letter to P. W. O., naval operating base, dated October 16, 1919, with inclosed claim covering one-half the increase in wages, dredge *Tornado*.

(*b*) Your letter to P. W. O., naval operating base, dated April 5, 1920, with inclosures.

(*c*) P. W. O. letter NOB–35359 of April 9, 1920.

(*d*) P. W. O. letter NOB–35956 of May 1, 1920.

(*e*) P. W. O. letter NOB–36291 of May 17, 1920.

(*f*) Your letter to P. W. O. of May 22, 1920, with inclosures, receipted bills in triplicate from the James Stewart Co.

(*g*) Conference held in Mr. Kurrie's office, Bureau of Yards and Docks, June 2, 1920; Mr. Kurrie, Mr. P. M. Corry, and Mr. F. H. Schomburg present.

"GENTLEMEN: The payment of claim reference (*f*) has been referred to the bureau for decision. You are advised that no action will be taken toward the settlement of this claim until you have satisfied the bureau that you have actually and really reimbursed the subcontractor, James

Stewart Company. As the bureau understands from conversation with your Mr. Schomburg, reference (*g*), also from conversation with Mr. Spellane of the James Stewart Company that, notwithstanding the receipted bills accompanying reference (*f*), no money has actually been paid by you to the James Stewart Company. The bureau is of the opinion that the general contractor is entitled to reimbursement on account of wage increases of subcontractors only after he has himself actually reimbursed the subcontractor, and then only to the extent of one-half the amount paid the subcontractor."

XXI. On September 9, 1920, the Chief of the Bureau of Yards and Docks wrote plaintiff relative to increased-wage adjustment as follows:

"Subject: Contract No. 2690, December 12, 1917, for dredging and filling at naval operating base, Hampton Roads, Norfolk, Va.

"GENTLEMEN: Your letter dated July 2, recently delivered to the bureau, with reference to your claim for increased-wage adjustment under contract No. 2690, has had consideration.

"The stand heretofore taken by the bureau in this matter, that under the terms of paragraph 2 of specification No. 2690 you are entitled, on account of the wage increase paid by your subcontractor, to but one-half the amount in which you are required to, and do, reimburse your subcontractor for such increase, is believed to be proper, and it is therefore confirmed."

XXII. Following more or less correspondence between the parties relative to the adjustment of claims for increased wages paid, the plaintiff wrote the Chief of the Bureau of Yards and Docks, concerning the matter, in part, as follows:

"We have your letter of June 12th in reference to above matter. This claim arises under article 2 of the general provisions of specification No. 2690 as follows:

"2. *Adjustment of wages.*—If, after the date of the contract, there shall be any increase in the rates of wages prevailing in the vicinity of a place where work contemplated by the contract is done that shall necessitate payment by the contractor on account of labor employed exclusively upon such work of rates of wages in excess of those prevailing in such vicinity at the date of the contract, he shall receive additional compensation in a sum equal to one-half the amount of the increase in the rates of wages so required to

be paid by him over the rates prevailing at the date of the contract. * * *

"A portion of the work under this contract was done by us through James Stewart & Co., Inc., as subcontractors, with whom we made the following stipulation in regard to increased wages under the above article:

"'The contractor will also reimburse subcontractor to the amount of one-half of any increase in wages the subcontractor may be required to pay over and above the rates prevailing at the time the contract between the contractor and the United States was signed, if and when the contractor receives such reimbursement from the United States, provided such amount is not withheld by the United States because of anything growing out of its contract with the contractor.'

"Claim has already been presented in detail showing James Stewart & Co. as subcontractors had paid out increased wages to the amount of $18,149.39 to the public-works officer.

"On May 1, 1920, the public-works officer requested us to furnish a receipted bill showing that we had reimbursed the subcontractor one-half of the above amount of increase of wages; that is, $9,074.69. On May 22 he submitted a receipt to us from the subcontractors for $18,149.39 as above. In filing this receipt there was no intent to deceive the officers of the Government in relation to the facts of the case. These were already known to the officers of the Government who would act upon the claim. The receipt was intended as a formal compliance with what we regarded as a formal requirement. The receipt is technically correct and was filed by arrangement with the bureau. We have already paid much more than this amount to James Stewart & Co., and both they and we were entitled to treat any sum paid by us to them as paid on this or any other account. The only concern of the United States is to know that James Stewart & Co. have received from us a sum which as between them and us is treated as on the above account.

"Mr. Kurrie, of the bureau, has also raised (verbally) the question whether we are entitled to receive any more than one-half of such amount as may be payable by us to James Stewart & Co. on account of such increase of wages; that is, one-half of one-half of the total so paid.

"This ignores the terms of the contract between the United States and us. These alone must decide the rights and obligations of both the parties to that contract. The contractor is to be paid 'one-half the amount of the increase in the rate of wages so required to be paid by him.' The question therefore is whether the contractor has in this in-

stance paid this increase. Our contention is that payment by our subcontractors is payment by us, so far as the United States is concerned.

"Under this contract we assume the obligation to the United States to do the work, as there specified. The United States was not concerned as to the means used by us, if the contract was not violated. We might have purchased dredges and used them, rented dredges and used them, or subcontracted to use the dredges and organizations of other contractors. All persons engaged by us to accomplish this work were strangers to the United States. So far as the United States is concerned, they were our employees. It made no difference to the United States on what terms we employed them or how we paid them so long as the work was done as required by the terms of the contract. Payment made to any wage earner on the job was made by us, whether the money passed through the hands of our paymaster or through the hands of our subcontractor and his paymaster. The United States can see only us in the matter of payment. * * *

"It is respectfully submitted that the department is not justified in withholding from us one-half the increase of wages paid by us through the hands of James Stewart & Co. as our subcontractors, and that the receipts of the workmen given to James Stewart & Co. are a sufficient evidence of payment to warrant payment to us without regard to any receipt to us from James Stewart & Co. The Government can regard only us and the workmen and must disregard the channel through which the workmen were employed and paid."

XXIII. It is shown that the usage and custom obtained quite generally of providing accommodations on the hydraulic dredges for boarding and housing the men employed on them and that it gave better satisfaction to include the expense of subsistence in the daily wage paid than to pay a stated wage in money and then charge and collect from the men a certain daily or weekly amount for boarding and lodging them, and that the former and more satisfactory plan was adopted and followed on the dredge *Conestoga*.

XXIV. Payment of the several items constituting plaintiff's claim, upon which this action is brought, was finally disapproved and disallowed by the Bureau of Yards and Docks.

The claim was later on reviewed and considered by the General Accounting Department and payment refused.

Reporter's Statement of the Case

XXV. On May 9, 1921, a qualified release was signed by plaintiff, which provided as follows:

"Whereas the contract dated December 12, 1917, by and between George Leary Construction Company, a corporation of the State of Delaware, party of the first part, hereinafter called the contractor, and the United States, party of the second part, hereinafter called the Government, for certain dredging and filling and the construction of a merchandise pier at the naval operating base, Hampton Roads, Va., contemplates that final payment thereunder shall not be made until the contractor shall have executed and delivered a final release of claims in such form and containing such provisions as shall be approved by the Navy Department of claims against the Government arising under or by virtue of said contract; and

"Whereas the work under said contract, including all additions thereto or changes therein provided for by supplemental agreement or otherwise, has been completed; and

"Whereas the contractor desires to be paid the balance admitted by the Government to be payable for said work and at the same time to reserve its claims for additional compensation in the sum of $18,149.39 on account of increase in wage rates paid by subcontractors over those prevailing at the date of the contract, and in the sum of $4,825.60 on account of expense of subsistence of employees on the dredge *Conestoga*, and the Government is willing to pay said balance and permit the excepting of said claims from the operation of the release of claims contemplated by said contract, provided it receives adequate consideration therefor, which consideration it has fixed at 2 per centum of the total amount ($22,974.99) of said claims, namely, $459.50;

"Now, therefore, in consideration of the premises, and for and in consideration of the sum of nine thousand nine hundred thirty and 14/100 dollars ($9,930.14), lawful money of the United States (said sum being the balance admitted by the Government to be payable for said work, namely, $10,389.64, less the sum of $459.50 deducted with the consent, hereby given, of the contractor as consideration moving to the Government for the payment of said sum of $9,930.14 coupled with the exception from the operation of this release of said claims for additional compensation in the amount of $22,974.99), to the contractor in hand paid by the Government, the receipt of which is hereby acknowledged, the contractor does hereby, for itself and its successors and assigns and its legal representatives, remise, release, and forever discharge the Government of and from any and all claims and demands whatsoever in law and in

equity, that the contractor has or may have under or by virtue of said contract, including all modifications thereof; expressly excepting, however, and excepting only, its said claims for additional compensation in the sum of $22,974.99, which said claims the contractor hereby expressly reserves. It is, however, distinctly understood that nothing in this release shall operate as, or be construed to be, a recognition or admission by the Government of the validity of said reserved claims or any part thereof."

The court decided that plaintiff was entitled to recover, in part.

BOOTH, *Judge*, delivered the opinion of the court:

The contract furnishing the basis of this suit provided in part as follows:

"*Adjustment of wages.*—If, after the date of the contract, there shall be any increase in the rates of wages prevailing in the vicinity of a place where work contemplated by the contract is done that shall necessitate payment by the contractor on account of labor employed exclusively upon such work of rates of wages in excess of those prevailing in such vicinity at the date of the contract, he shall receive additional compensation in a sum equal to one-half the amount of the increase in the rates of wages so required to be paid by him over the rates prevailing at the date of the contract: Provided, that in determining such additional compensation wages paid by the contractor at any time during the continuance of the contract in excess of the rates prevailing in the vicinity at the time of such payment shall be disregarded to the extent of such excess: and provided further, that any increase over wage rates prevailing at the date of the contract before being granted by the contractor shall be notified to and approved in writing by the Bureau of Yards and Docks. For the purposes of this paragraph, rates of wages prevailing in the vicinity of a place where work contemplated by the contract is done shall be understood to mean the established rates of wages in the nearest navy yard or station, if there be one within 50 miles of such place, or, if there be none within that distance, the rates of wages paid under a well-established wage scale, if any, in such vicinity, or, if there be none, such reasonable rates of wages as may be determined by the Navy Department, Bureau of Yards and Docks. The burden shall be upon the contractor of establishing to the complete satisfaction of the Bureau of Yards and Docks all facts upon which any claim for additional compensation hereunder shall rest, and all questions growing out of any such claim shall be determined by the Navy

Opinion of the Court

Department, Bureau of Yards and Docks, whose decision thereon shall be final and conclusive. Determination of such claims shall be deferred until the completion of the contract."

The plaintiff stated its claim for increase in wages arising under this provision and fixed the amount at $15,397.92, $4,825.60 of this total amount representing cash outlay for subsistence of the men employed by the plaintiff in the performance of the contract. When the claim reached the Bureau of Yards and Docks the item of $4,825.60 was disallowed and $10,572.32 allowed. The bureau determined that subsistence furnished was not wages paid. We need not discuss the merits of the disallowance now sued for. The clause under which the allowance and disallowance were authorized provided that the board's decision in this respect should be final. The authorities sustaining the conclusiveness of the board's decision are too many to warrant citation. *Yale & Towne Mfg. Co.* v. *United States*, 58 C. Cls. 633.

Subsequently an additional claim arose under this same clause of the contract. The facts are these: July 31, 1918, the plaintiff sublet a part of the work under its contract to James Stewart & Company, and with the Stewart Company the plaintiff agreed that any sum allowed for increase of wages as per plaintiff's contract with the Government would be paid by the plaintiff to the Stewart Company, and if the Government made no allowance the plaintiff was to pay nothing to the Stewart Company, both parties realizing that the question of an allowance depended upon the final action of the Bureau of Yards and Docks. The James Stewart Company performed its subcontract; the work was done and was satisfactory to the Government. When the contract was completed, the increase in wages, accurately kept, was claimed by the plaintiff, and the amount stated was approved by the public-works officer and finally transmitted to the Bureau of Yards and Docks for final action. The Bureau of Yards and Docks in its decision uses this language, found in Finding XXI:

"The bureau is of the opinion that the general contractor is entitled to reimbursement on account of wage increases of subcontractors only after he has himself actually reimbursed the subcontractor, and then only to the extent of one-half the amount paid the subcontractor."

Again, on September 9, 1920, the bureau found as follows:

"Subject: Contract No. 2690, December 12, 1917, for dredging and filling at naval operating base, Hampton Roads, Norfolk, Va.

"GENTLEMEN: Your letter dated July 2, recently delivered to the bureau, with reference to your claim for increased-wage adjustment under contract No. 2690, has had consideration.

"The stand heretofore taken by the bureau in this matter, that under the terms of paragraph 2 of specification No. 2690 you are entitled, on account of the wage increase paid by your subcontractor, to but one-half the amount in which you are required to, and do, reimburse your subcontractor for such increase, is believed to be proper, and it is therefore confirmed."

In its final analysis the decision of the bureau was a refusal to allow what the plaintiff's contract with the Government expressly entitled the plaintiff to receive, because the plaintiff had not shown payment by it to its subcontractor. The bureau had no jurisdiction over the contract between the plaintiff and its subcontractor. It was no affair of the bureau's whatever with respect to this claim. The plaintiff was within its rights in subcontracting a portion of the work, and no complaint as to performance of the work was lodged against the plaintiff or the subcontractor. The Government looked to the plaintiff for the performance of the subcontractor's contract, and it would create a most unusual situation that a sum admittedly due under the plaintiff's contract may be legally withheld from it on the pretense that the plaintiff had not settled with or discharged its obligations to its subcontractor. The payment to the plaintiff of the amount claimed discharged the Government from its liability under the contract. The subcontractor could not sue for the amount, and the bureau manifestly exceeded its jurisdiction in disallowing the claim for the reasons stated. *Merritt* v. *United States*, 267 U. S. 338.

It is difficult to comprehend by what supposed authority the bureau was acting when it said in effect, "Yes, the amount you claim is justly due, but we decline to pay it because you have not shown us that you have paid your subcontractor the amount claimed." The comprehensive terms conferring jurisdiction on the bureau with respect to the

question of increase in wages are not sufficient to warrant the exercising of an authority over matters outside the contract between the plaintiff and the Government. The plaintiff, in its own name, presented the claim for increase, and while it acted honestly and aboveboard in stating the terms of its contract with the subcontractor, it was under no legal obligation to do this. Having presented its claim in its own name, the plaintiff was entitled to consideration under its contract, and the jurisdiction of the bureau was conferred upon it by the terms of the plaintiff's contract and not the subcontract. The Government having covenanted to meet one-half the increase in wages due to war conditions assuredly may not escape observation of the obligation by requiring the contractor to show before the allowance that he had discharged his indebtedness to a subcontractor engaged by the contractor to do what the latter was to do. The bureau had nothing to do with the payment of the allowance; its authority was limited to finding the amount due and certifying the same. It is easy to forecast the financial ruin of a Government contractor if the rule is to be established that he may not receive amounts due from the Government under his contract until he establishes to the satisfaction of the Government that he has paid his subcontractor all he owes him. As between the plaintiff and the Government under the existing contract, the bureau had ample authority to pass upon and allow or disallow the claim for increase in wages. This it did do and found no objection, predicating its disallowance upon a matter outside its jurisdiction. We think the item is allowable, and judgment for the amount will be awarded. *Stout, Hall & Bangs* v. *United States*, 27 C. Cls. 385.

The final controversy revolves about a section of the work to be done, known as area "D." This area the plaintiff was to fill in sixty calendar days and receive therefor twenty-seven cents per cubic yard. The Government under the contract had the direction of the work. The plaintiff's contract was dated December 12, 1917. The plaintiff was not asked, nor was any suggestion made to it, to proceed with the filing of area "D" until May 28, 1919, over a year and five months after the date of the contract, and over eight months

Opinion of the Court

after the time fixed by the contract for the entire completion of area "D." The reason for this delay is perfectly obvious. The Government wanted to and did utilize area "D." As a matter of fact, it would have seriously discommoded the Government if the plaintiff had filled the area, and the plaintiff could not get in there to do it properly. During the war the Government erected houses on stilts within the area, honeycombed it with sidewalks to and from the structures erected; stored coal, and otherwise utilized the space as war necessities impelled. It is no exaggeration to say that the Government had no desire to have the area filled during this period of delay. When, therefore, the plaintiff was ordered to proceed with the filling of the area, it demurred to the order, asserting that, in view of the long delay, the increase in wages and the apparent difficulties to be encountered because of what the Government had done, it was entitled to increase in its compensation. Plaintiff finally offered to do the work at actual cost and to lose its profit. The Government declined to accede to either of the plaintiff's requests. Instead, it employed James Stewart & Company to use one of its own dredges and paid it, not by the cubic yard, but so much per diem, thereafter deducting the excess cost of $4,825.60 from amounts due the plaintiff under its contracts. We should have said that the plaintiff refused to proceed under its contract in area "D." We think this item clearly allowable. When the Government deviated from the terms and conditions of the plaintiff's contract and engaged another to do the contract work on an entirely different basis from the one fixed in the primary agreement, it can not charge the difference to the alleged defaulting contractor. *Cal. Bridge & Con. Co.* v. *United States*, 50 C. Cls. 40; *United States* v. *Axman*, 234 U. S. 36.

Area "D" was not included in the triparty contract set out in Finding VI. A map attached to the contract expressly so states. The finding discloses that the plaintiff was not relieved by the triparty contract from all work to be done under its original contract, and area "D" was to be filled by the plaintiff under its own contract.

Again, if the Government prevents a contractor from doing what it agrees to do, the Government can not insist upon

the performance of the contract; the contractor has an option—he may, if he choose, abandon the contract. *Anvil Mining Co.* v. *Humble*, 153 U. S. 540; *United States* v. *Behan*, 110 U. S. 338.

Judgment should be entered for the plaintiff for the sum of $14,012.34. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

HAY, *Judge*, dissents.

CARRIE HOWARD STEEDMAN AND EUGENIA HOWARD EDMUNDS v. THE UNITED STATES[1]

[No. E-563. Decided February 28, 1927]

On the Proofs

Federal estate tax; real estate included in gross estate; section 402(a), revenue act of 1921.—The value of the gross estate of a decedent in the State of Missouri subject to the provisions of section 402(a), revenue act of 1921, includes the real estate owned by such decedent at the time of his death.

The Reporter's statement of the case:

Mr. S. L. Swarts for the plaintiffs. *Messrs. Frank S. Bright* and *Lowndes C. Connally* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiffs Carrie Howard Steedman and Eugenia Howard Edmunds at all times hereinafter mentioned were, and still are, citizens of the United States and residents of the city of St. Louis, State of Missouri.

II. Kate M. Howard, mother of the plaintiffs, died on the 23d day of February, 1923, being a widow and a resident of said city of St. Louis at the time of her death, and leaving a last will and testament dated the 5th day of November, 1918, which was duly admitted to probate in the probate court within and for the city of St. Louis, Missouri, on the

[1] Writ of certiorari denied.

7th day of March, 1923. On the 12th day of March, 1923, George Fox Steedman and Sterling E. Edmunds were duly appointed and qualified as executors of the estate of Kate M. Howard, deceased.

III. The city of St. Louis, State of Missouri, was at all the times herein mentioned, and still is, within the district of the office of the collector of internal revenue located in said city.

IV. By said last will and testament of said Kate M. Howard, deceased, one-half (½) of the entire net estate of said decedent, real and personal, was devised and bequeathed to the plaintiff, Carrie Howard Steedman, and one-half (½) of said entire net estate was devised and bequeathed to the plaintiff, Eugenia Howard Edmunds, after the payment of decedent's debts, her funeral expenses, and the expenses of her last illness.

V. Said executors duly administered said estate according to law and distributed the entire net personal estate of said decedent to the plaintiffs in equal shares, pursuant to the provisions of said last will and testament and the orders of said probate court. On the 7th day of July, 1924, said executors filed their final settlement of said estate and said final settlement was duly approved, and said executors were duly discharged as such by said probate court. Said real estate passed directly to plaintiffs under said will.

VI. Pursuant to the revenue act of November 23, 1921, said executors, on or about the 31st day of December, 1923, filed in the office of the collector of internal revenue at St. Louis, Missouri, a Federal estate tax return for said estate of Kate M. Howard, deceased. The return showed a gross estate of the decedent of $1,707,576.46, which included the real estate situated in the State of Missouri, at the value of $393,776.67; a net estate for the purposes of the Federal estate tax of $1,542,635.54 and a tax of $106,616.26, which said tax of $106,616.26 was duly paid to the collector of internal revenue at St. Louis, Missouri, on December 31, 1923.

VII. Subsequently, and in due time, said Federal estate tax return was audited and reviewed by the Commissioner of Internal Revenue, who determined and fixed the total value of the gross estate of said decedent to be $1,757,542.89,

including the value of the real estate situated in the State of Missouri owned by the decedent at the time of her death, which was fixed at the sum of $433,700.00; and said commissioner, after allowing deductions from said gross estate in the sum of $161,187.00, including the statutory exemption of $50,000.00, finally determined and fixed the value of the net estate of said decedent for the purposes of the Federal estate tax to be $1,596,355.89, and the Federal estate tax on the transfer thereof to be the sum of $113,062.71, thereby determining that there was due from the executors of said estate an additional tax of $6,446.45, over and above the tax theretofore paid on the return. Said executors, after notice, and demand, paid said additional tax of $6,446.45 to the collector of internal revenue at St. Louis, Missouri, on November 12, 1924. Had the commissioner excluded from the gross estate of said decedent the value of the real estate situated in Missouri, the net estate for the purposes of the Federal estate tax would have been $1,162,655.89, the tax upon the transfer of which would have been $67,765.64, instead of $113,062.71 actually determined by said commissioner and paid by said executors. The action of the commissioner upon the review and audit of said return in continuing to include in the gross estate said real estate situated in Missouri at an increased valuation, with the resultant increase in the tax, is material; but no other changes made by him upon said review and audit are material to this litigation.

VIII. There was included in the sum of $161,187.00 allowed by said commissioner as deductions from the said gross estate, the sum of $27,934.56, representing debts of said decedent for which claims had been presented to and allowed by said probate court, and no other claims or demands were presented to or allowed by said probate court as debts of the decedent, and the said sum of $27,934.56 representing debts of the decedent was duly paid by said executors out of the personal estate of said decedent. Included in the deductions allowed by the commissioner from said gross estate was the sum of $1,220.63 representing real estate taxes on said real estate accrued to the date of decedent's

death. There were no mortgages or other liens on said Missouri real estate.

IX. On the 19th day of February, 1925, plaintiffs duly filed in the office of the collector of internal revenue at St. Louis, Missouri, pursuant to law, a claim for refund of Federal estate taxes alleged to have been erroneously and illegally assessed and collected by the defendant from said estate of Kate M. Howard, deceased, in the sum of $45,297.07, the amount of tax, not including interest, refundable if the value of the real estate situated in Missouri was improperly included in the decedent's gross estate, which claim for refund alleged and charged:

That the Commissioner of Internal Revenue had erroneously and illegally included in the value of the gross estate of said decedent the real estate situated in the State of Missouri owned by the decedent at the time of her death.

That said claim was based upon the contention that said real estate situated in the State of Missouri, owned by the decedent at the time of her death, was not subject to the payment of the expenses of the administration of her estate, and was therefore not taxable under section 402 of the revenue act of November 23, 1921, which required that the value of the gross estate of the decedent should be determined by including the value at the time of her death of all property, real or personal, tangible or intangible, wherever situated (a) to the extent of the interest therein of the decedent at the time of her death, which after her death was subject (1) to the payment of the charges against her estate and (2) to the payment of the expenses of the administration of her estate and (3) to distribution as a part of her estate.

X. On the 20th of August, 1925, said claim for refund was wholly disallowed and rejected in its entirety by said Commissioner of Internal Revenue.

XI. At all of the times mentioned herein, sections 141 and 142 of the Revised Statutes of Missouri, 1919, were in full force and effect and said sections were and are as follows:

"SEC. 141. SALE OF LANDS TO PAY DEBTS.—If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts; and praying for the sale of the real estate, or so much thereof as

will pay the debts and legacies of such deceased person." (R. S. 1909, sec. 150, amended laws 1919, p. 101.)

"SEC. 142. PETITION AND EXHIBITS.—Such petition shall be accompanied by a true account of his administration, a list of debts due to and by the deceased and remaining unpaid, and an inventory of the real estate and of the remaining personal estate, with its appraised value, and all the other assets in his hands, and the whole to be verified by the affidavit of the executor or administrator." (R. S. 1909, sec. 151.)

XII. Upon the settlement and distribution of said estate by the executors as aforesaid, the entire residuary personal estate of said decedent, including this claim, was by order of the probate court and in pursuance of the provisions of said will of the decedent, transferred to plaintiffs, one-half to each, and no assignment of said claim, or any part thereof, or any interest therein has been made by plaintiffs or either of them to any person, persons, or corporation, nor has any transfer been made by either of them of her one-half interest or any part thereof in said claim presented in the above-entitled cause, and which was received by them under said will as aforesaid.

The court decided that plaintiffs were not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case involves a claim for refund of estate taxes voluntarily paid, upon the ground that there was erroneously included in decedent's tax return as a part of her gross estate, certain real estate located in the State of Missouri owned by her at the time of her death, for the alleged reason that under the statute of that State real estate could not be sold for the payment of expenses of administration and should, therefore, have been excluded from the gross estate under the terms of the taxing statute. Thus in effect plaintiffs are claiming an exemption by reason of the alleged failure of the State to pass a statute, and attempting to make the enforcement and effectiveness of the taxing act contingent and dependent upon the passage by the different States of statutes making real estate subject to sale for payment of administration expenses.

The question involved is whether the value of this real estate should have been included in the gross estate of the decedent under the provisions of section 402 (a) of the revenue act of 1921, 42 Stat. 227, chap. 136, as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate; * * *."

The mother of the petitioners, Kate M. Howard, died on the 23d of February, 1923. She owned at the time of her death certain real estate which she devised to the petitioners, one-half to each, by her last will and testament. Her executors, in making a return for Federal estate tax purposes, included the value of this real estate in her gross estate, and paid the taxes assessed. They thereafter filed a claim for refund upon the ground that said real estate should not have been included in the gross estate. The Commissioner of Internal Revenue rejected the claim and thereupon this action was brought for the same reasons as those urged before the commissioner.

The Supreme Court in construing the above-quoted section of the act of 1921, in the case of *United States* v. *Field*, 255 U. S. 257, 262, held that the provisions of paragraph (a) of section 402 must be taken conjunctively. The court said:

"These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interests [the property involved in this particular case] fulfilled all three conditions, it was not taxable under this clause."

It will be seen that section 402 provides, first, that the value of the gross estate shall include "all property" of the decedent at the time of death, wherever situated; second, "to the extent of the interest" therein of the decedent at the time of death; and third, said interest is such interest as after

the decedent's death is "subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate."

The decision of the Supreme Court in the *Field case*, it is urged, requires that in order to subject to taxation an interest in real estate of which a decedent dies the owner, it must be "subject to" all three of the conditions named.

The plaintiffs' contention is that under the statutes and rulings of the courts of Missouri the real estate of a decedent is not "subject to" the payment of "expenses of its administration," conceding that it is subject to the other conditions. The statutes of Missouri allow the sale of real property for the payment of debts and legacies, and section 149 of the Missouri Code provides:

"The proceeds of the sale of such real estate shall be first applied to the payment of such judgments and attachments according to their priority of lien, and the residue of such proceeds, if any, shall become assets in the hands of the executor or administrator to be administered according to law."

Section 402, *supra*, does not use the word "liable"; it uses the words "subject to." "Subject to" does not necessarily mean "liable for." It may be said that where land is liable for sale for the payment of debts, it is subject to the payment of debts, but the converse is not necessarily true. Real estate may be under certain conditions "subject to" the payment of expenses of administration and yet not liable to sale therefor; that is, it may be under the contingency of or exposed to payment of administrative expenses and thus "subject to" the payment.

Real estate may be sold under the Missouri statute for the payment of debts, and, having been sold, because the personal estate was not sufficient to pay the debts and the administration expenses, the latter could be paid, under the decision of the court of Missouri, out of the fund realized from the sale. *Howell* v. *Jump*, 140 Mo. 441. If the proceeds from the sale of real estate for payment of debts may be used under certain contingencies for the payment of administration expenses, it is in such a case "subject to" the payment of the expenses of administration.

The expression "expenses of administration" covers the whole field of administrative charges. It is difficult to see how real estate could be sold and the proceeds not be held liable for the expenses incident to the sale, which, in the case of a sale by an administrator under order of court, are part of the expenses of administration.

The plain purpose of Congress as disclosed by the first part of section 402 was to subject to taxation "all of the estate" of a decedent to the full extent of his interest therein at the time of his death, whether real or personal, tangible or intangible, and wherever situated.

What the qualification, "which is subject to," was expected to exclude it is difficult to see. It is not reasonable to hold that Congress intended or had in mind the possibility of the exclusion from taxation of all real estate of a decedent where a statute of the State in which it was located did not specifically grant the right to sell it for the payment of the expenses of administration, or where a court of such State had held that under the existing statute it could not be subjected to sale for such purpose; that is to say, it is unreasonable to hold that Congress intended to exempt from taxation the real estate of a decedent in any of the States where the statute of the State did not specifically authorize the sale of it for the payment of expenses of administration. If each of the States had no such statute, all real estate would be exempt, and if in one State there was such a statute, the real estate would be taxable, and in another, where there was none, it would not be taxable, thus creating an inequality in taxation and a discrimination in favor of the States that have not passed such a statute.

The case of *United States* v. *Field*, *supra*, under the facts, we do not think controlling here.

It is presumed that Congress knew that under the common law real estate could not be sold by a probate court for the payment of debts or administration expenses. To hold that it intended to exclude from taxation all real estate or interest therein which was not subject to the payment of charges against the estate or expenses of administration and subject to distribution, unless specially allowed and jurisdiction given to the courts by State statutes, would be to hold that

Syllabus

Congress included all real estate as subject to taxation and then provided for the possibility of all of it being excluded and exempted.

It is an established rule of construction that an act must be read as a whole with a view to ascertaining the real purpose of Congress, with the assumption of a reasonable and intelligent purpose on its part, and that no construction should be given to an act or a limitation thereof which would do violence to the general purpose of the act and render it futile or absurd. It is the duty of the court to so construe an act as to accomplish its general purpose and to enforce it in conformity with that purpose and within the reason of the act.

We are of opinion that the real estate of the decedent was properly assessed as part of her gross estate by the Commissioner of Internal Revenue under section 402 of the revenue act of 1921, and that plaintiffs are not entitled to the refund which was refused by the commissioner.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

POOLE ENGINEERING & MACHINE CO. v. THE UNITED STATES

[No. A-331. Decided March 7, 1927]

On the Proofs

Contract; delay by Government; decision of contracting officer; release of Government from damages.—In a contract with the United States the plaintiff agreed to make and deliver barbette gun carriages at a fixed price and at stated times, the Government to furnish castings therefor within a fixed period. The castings were not furnished by the dates agreed upon and by reason thereof the plaintiff was delayed in its work and was granted an extension of time partially covering such delay. The contracting officer found that the entire period of delay in the work was due to nondelivery of the castings and liquidated damages provided for by the contract for delays were remitted to the contractor and it was paid the full contract price, as modified by additions and deductions due to changes in specifications. The contract provided that in making settlement the

contractor should be credited for all delays which the contracting officer might "determine to have been due to action of the United States," and that such cause should not "constitute a basis for action against the United States for damages." *Held*, that plaintiff could not recover the additional expense due to the delay on the part of the Government.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Poole Engineering and Machine Company is a corporation organized under the laws of the State of Maryland, having its principal office and place of business in the City of Baltimore, and had been for many years, and was at the times hereinafter mentioned, conducting a general engineering and machinery business.

II. On January 3, 1917, plaintiff entered into a contract with the United States, represented by Colonel J. H. Rice, Ordnance Department, for the manufacture and delivery of nine barbette gun carriages at a fixed price of $49,000.00 each. These carriages were to be delivered, the first by January 3, 1918, and the last by July 3, 1918. A copy of said contract is filed with the petition as Exhibit "A" and is made a part hereof by reference.

III. The Government agreed to finish the castings entering into the manufacture of the carriages, the delivery of the castings to begin by the 3d day of April, 1917, and be completed by October 3, 1917. Several hundred separate parts entered into the manufacture of a completed carriage, and in order to do the work properly and in order it was necessary that the castings be furnished in a regular and systematic way. The plaintiff worked out a schedule for the delivery of these castings and forwarded it to the United States Arsenal at Watertown, Massachusetts, and the Government approved the schedule.

IV. A large planer which had been ordered by the plaintiff from the Detrick & Harvey Machine Company was not

completed and ready for operation until the middle of January, 1918. This machine was needed to plane large castings. The contractor had an old planer of obsolete design on which he endeavored to plane the large side frames, but this heavy work was beyond its capacity, and owing to the lack of proper crane facilities for handling large castings, the many adjustments necessary on this old planer, and the handling of the frames by inadequate facilities, excessive time and labor were consumed, which greatly retarded the work and added to the cost.

On December 28, 1917, the plaintiff, in writing, requested the War Department to extend the contract period of delivery for 90 days, assigning as the reason for the extension the fact that this special machinery, which was relied on to complete the carriages on time, was greatly delayed through no fault of the contractor, and also assigned the interruption of the labor market by the declaration of war in April, 1917, which occasioned the loss in operators by voluntary enlistments and the draft.

On April 3, 1918, the Government extended the contract time sixty days. This action of the Government extended the period of final completion from July 3, 1918, to September 1, 1918.

The contractor was experienced in gun-carriage work, having manufactured carriages of a smaller type under previous contracts; the plant was supplied with certain equipment and facilities for performing the work, the necessary labor was available, and all the necessary skilled superintendence and assistance were on hand, but it was necessary to provide certain special machinery which could handle the large castings with greater ease and accuracy. This machinery was ordered by the plaintiff on January 18, 1917, but was not delivered until the late fall of 1917.

V. The Government delivered a few castings prior to April 3, 1917, but did not at that date, or for some time thereafter, deliver all the castings necessary in the manufacture of one complete gun carriage and failed to deliver all the castings necessary in the manufacture of the nine gun carriages by October 3, 1917, but continued to deliver the castings from time to time thereafter until June 17, 1919, on which date the last casting was delivered.

VI. The contractor made frequent protests, verbal and in writing, to the contracting officer, and others in authority at the War Department, about the failure of the United States to furnish the castings in a timely and orderly fashion and called attention many times to the fact that delay by the Government was greatly interfering with its scheduled production and adding to the cost of manufacture.

VII. The failure of the special machinery to arrive on time and the failure of the Government to deliver the castings per schedule occasioned additional cost in the performance of the work. The uncertain and tardy delivery of the castings prevented the contractor from carrying on the work in accordance with any system and obliged it to shift its operations needlessly. The period of performance was prolonged into a time when labor and overhead costs had advanced greater than those during the period fixed in the contract.

At the time work on the contract in suit was in progress the plaintiff was performing work on other contracts with the Government, and during the periods of delay on the contract in suit labor employed thereon which otherwise would have been idle was shifted to work on the other contracts.

VIII. The gun carriages were completed and delivered at various dates in 1919, and delivery of the last carriage was on June 19, 1919.

IX. In the course of the work the Government assessed liquidated damages for failure to complete deliveries in accordance with the terms of the contract.

On May 6, 1919, the plaintiff sent and in due course the War Department received the following letter:

MAY 6TH, 1919.

Subject: Liquidated damages—12″ barbette carriage contracts.

Lieut. Col. J. H. RICE,
Office of the Chief of Ordnance,
War Department, Washington, D. C.,
Via Inspector of Ordnance, U. S. A.

SIRS: The Poole Company is now nearing completion of its contract for barbette carriages, and we wish to bring to

your attention at this time certain facts which will have a bearing on the claim the Poole Company intends to make for additional compensation due to conditions arising beyond its control, and on a claim which we intend to make for a waiver of liquidated damages.

This contract was taken prior to the United States going into the war. At that time our estimates were based on certain wage rates then existing and on certain conditions. Due to war conditions, resulting in a practical control of all interests by the Government, wages were advanced, and we were forced to take work which we otherwise would not have been obligated to take. The net result is that we have suffered a great loss on each one of the carriages produced.

The principal point, however, in connection with this proposition is that, due to delays on the part of the Government in supplying us with castings, and due to changes in the specifications, drawings, etc., we were delayed many months. During these months daily wage rates were increased, and we were damaged to the extent of the difference.

We simply want to go on record at this time that we intend to ask the Government to reimburse us up to our fair cost, otherwise we feel that we would be done a great injustice. We have all the facts and data in connection with this contract, and would be pleased to have you advise us how to proceed.

Respectfully,

POOLE ENGINEERING & MACHINE CO.,
By DUDLEY SHOEMAKER, *Vice President.*

DS: D

On February 25, 1920, the contractor applied for an official determination of the responsibility for the delays, and asked for remission of the liquidated damages. On May 21, 1920, the contracting officer made a finding, which was approved by the Ordnance Department, that the contractor was delayed 351 days between January 3, 1918, and June 19, 1919, inclusive, by reason of the failure of the Government to furnish the castings. The liquidated damages theretofore assessed were remitted to the contractor, and the full contract price was paid to the plaintiff as modified by certain additions and deductions made necessary by the changes in the plans and drawings in accordance with section 5 of the contract.

X. Payments to the plaintiff by the defendant on the contract of January 3, 1917, were provided for by a supple-

mentary contract between the parties dated April 18, 1918, whereby, among other things, the defendant agreed to advance the plaintiff on designated security money for working capital, the plaintiff to repay the advance with interest, the defendant being authorized to deduct thirty-five per cent from each bill presented by the plaintiff in the course of the work and to apply such deductions first to the repayment of the advance and thereafter to the payment of interest accrued on outstanding balances. In accordance with this arrangement the defendant on April 18, 1918, by its disbursing officer, advanced the plaintiff $130,000, and thereafter as the work progressed and deliveries were made there were further payments to the plaintiff on bills presented by it with allowances for liquidated damages for the several delays in the delivery of each carriage, and for retained percentages of twenty-five per cent of the several bills in addition to the aforesaid recoupment of thirty-five per cent.

The last principal payment on the carriages was made July 10, 1919. Thereafter the payments made were compensation to the plaintiff for authorized changes, refundments of the liquidated damages theretofore deducted, and refundments of the retained percentages, with deductions for accrued interest and charges for material, patterns, etc., furnished by the Government, so that in all the plaintiff has received, under the terms of its said principal and supplementary contracts, the net sum of $447,562.20.

Final payment was made June 29, 1921, for $12,250.00, representing retained percentage on the first carriage delivered.

XI. The excess cost of labor, overhead, and other administrative expenses incurred by the plaintiff by reason of the nonreceipt of the aforesaid castings, and paid by it, is not satisfactorily proved.

XII. The defendant sets up a counterindebtedness on the part of the plaintiff and in favor of the United States for excessive or erroneous payments under three war contracts.

(1) Construction contract No. 771, dated August 12, 1918____ $2,547.95

This amount was paid the plaintiff as contractor for work performed by a subcontractor, but there is no evidence substantiating an erroneous payment.

Opinion of the Court

(2) Ordnance contract P 2191-1188A, dated March 11, 1918.. $7, 260. 61

The Secretary of War made an award in final settlement of this contract under the Dent Act.

(3) Ordnance contract P 12536-3099A, dated July 24, 1918.. $56, 846. 06

The Secretary of War on September 19, 1919, after an audit, made an award under the Dent Act in full and final settlement of this contract.

XIII. No claim was presented by the plaintiff to the War Department or General Accounting Office.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

On January 3, 1917, the plaintiff, Poole Engineering and Machine Company, entered into a contract with the United States Government for the manufacture for the use of the Ordnance Department of nine 12-inch barbette gun carriages in accordance with certain plans and specifications, at the price of $49,000 each to be delivered, the first carriage on or before January 3, 1918, and all of the nine carriages on or before July 3, 1918. Said contract provided that the steel castings necessary for the construction of the carriages would be furnished by the Ordnance Department beginning on or before April 3, 1917, and to be completed on or before October 3, 1917.

The Government failed to furnish the castings for the first carriage by April 3, 1917, and also failed to furnish the castings required for all the carriages by October 3, 1917. Castings for the first carriage were not delivered until November 6, 1917, and the last of the castings for the whole number were not delivered until June 17, 1919, more than a year after the entire work was to have been completed.

It is alleged that the rates of wages prevailing during 1917 and the first half of 1918 were substantially lower than they were in the last half of 1918 and the first half of 1919, for the same character of labor. Plaintiff avers that but for the delay by the Ordnance Department in furnishing the steel castings it could and would have completed the contract within the specified time and under the lower rates of wages, and that by reason of said delay it has been damaged in the

Opinion of the Court

sum of $150,000. It is also alleged by plaintiff that it was required to maintain its organization for the performance of its contract, and that the overhead expenses chargeable to this work after July 3, 1918, together with the proper share of administrative expenses, likewise chargeable to defendant's delay, amounted to the sum of $75,000. This suit is for the recovery of the sum of these two items, $225,000.

On May 6, 1919, which was a few weeks before the completion of the work under the contract, plaintiff wrote a letter to the Chief of the Ordnance Department, calling attention to delays occasioned by the failure of the Government in furnishing the castings and also on account of changes in specifications provided for in the contract. In this letter particular reference is made to the matter of liquidated damages which might be claimed by the Government under the terms of the contract. It is further stated, "We simply want to go on record at this time that we intend to ask the Government to reimburse us up to our fair cost, otherwise we feel that we would be done a great injustice. We have all the facts and data in connection with this contract, and would be pleased to have you advise us how to proceed."

It is interesting to note that, so far as this record discloses, the question of damages was never again mentioned by plaintiff. On receipt of the letter the question of a waiver of liquidated damages was taken up for consideration, and after an investigation by representatives of the Government it was determined that the Ordnance Department had been responsible for plaintiff's delay, and the amount which had been retained from time to time as liquidated damages was paid to plaintiff. The final payment of the contract price, on the delivery of the last gun carriage, was made on July 10, 1919. Various other items constituting a claim for the extra cost of changes authorized by the contract and involving a substantial sum were paid at different periods, each being the subject of more or less correspondence, but at no time during the discussion and settlement of these various

items did plaintiff suggest that he would claim damages against the Government. The purpose of the letters from plaintiff to the Government prior to May 6, 1919, according to the testimony of Clay C. Bartlett, purchasing agent of plaintiff, on cross-examination, was to expedite delivery in order that the contract might be completed within the specified time, thereby relieving plaintiff of liability for liquidated damages. Obviously, there was no thought during the progress of the work of any claim for damages.

The vice president of the company, Dudley Shoemaker, testified on cross-examination that the question of damages was first considered " when we closed our books and the comptroller of the company showed us how much our cost exceeded our estimates." Certainly the books were not closed on this account until long after the letter of May 6, 1919. Plaintiff's damages, if any, grew out of the contract. It was a part of plaintiff's claim on account of work performed under the contract. Plaintiff should have definitely asserted its claim at or before the final payment. The letter of May 6, 1919, is not the assertion of a claim for damages. It is nothing more nor less than the declaration of an *intention* to request a reimbursement of its loss on account of increased cost of labor and overhead. Plaintiff's conduct thereafter was such as to justify the assumption that even if plaintiff in good faith intended on May 6, 1919, to claim damages that intention had been abandoned. In the light of the statement of the vice president that the first thought of a claim for damages was when the books were closed, there can be little doubt as to the correctness of this assumption.

Plaintiff's course throughout the whole transaction, as will presently be more fully shown, is clearly indicative of a feeling of uncertainty as to whether or not it had a valid and enforceable cause of action against the Government.

The evidence as to the amount of damages herein is unsatisfactory. Witnesses endeavored to give an estimate as to the proportion of the increased cost of labor and cost of overhead expenses properly chargeable to plaintiff's contract. During this same period plaintiff had on hand several other

Opinion of the Court

contracts with the Government, one of which involved the construction of two additional gun carriages of precisely the same type and class as those constructed under the first contract. It had ten times more work than it could handle, according to the testimony of one of plaintiff's witnesses. The difficulty of distributing increased cost of operation to any particular contract is at once apparent. As illustrative of the indefinite and uncertain character of the evidence upon which plaintiff relies herein, it might be mentioned that plaintiff's chief witness on this point, Allen O. Stehl, an accountant, estimated the amount chargeable to this contract on account of excess labor at $24,501.81; for excess cost of "shop overhead," $68,039.41; and excess cost of "general overhead," $24,799.57, making a total of $117,340.79. This witness was introduced later and testified that in his first estimate he had included the excess cost on the two additional carriages mentioned above, and he therefore desired to reduce his total estimate to $95,984.77. This was accomplished by deducting from $117,340.79 two-elevenths of that sum. The witness stated that there was no way to determine the exact amount. Mr. Shoemaker, in response to a question on cross-examination concerning the proportion of "overhead" cost chargeable to plaintiff's contract, stated "It is impossible for me to answer that question; it is impossible for anybody to answer it. We tried to do that on another contract, distributing overhead on other contracts going through at the same time." Considering all the evidence we are inclined to agree with the witness, who with the advantage of a previous unsuccessful experiment declared that it was impossible of accomplishment. There was no appreciable loss of time on account of delays in the delivery of the castings. The labor employed on the gun-carriage contract was merely shifted to other work during any delay period.

The contract involved herein contains another provision which is determinative of the case. It is as follows:

"In making settlements in which such charges are involved the contractor shall receive credit for all delays which the contracting officer or his successor may determine to have been due to action of the United States and for such other

delays as the same authority may decide to have been due to such unavoidable causes, including fires, unseasonably severe storms, and labor strikes in the works of the contractor, as occurred before the date upon which final delivery is due under the provisions of Article I, or before the expiration of the time thereafter for which credit is allowed under this article; and the date of the final delivery shall be considered for the purpose of settlement as the date of actual final delivery less the delays for which credit has been allowed; but none of the above causes shall constitute a basis for action against the United States for damages."

The history of this litigation deserves notice. The original petition in this case was filed December 7, 1921. To this petition defendant interposed a demurrer, which was sustained by the court in an opinion by Chief Justice Campbell, in which the questions in issue were thoroughly considered. (57 C. Cls. 232.) After discussing the contract involved herein as to certain aspects of the case the court said, "but it also provides that 'none of the above causes shall constitute a basis for action against the United States for damages.' If there was otherwise a cause of action on account of alleged delays, this stipulation is sufficient to defeat it."

Thereafter on motion for new trial the order of dismissal was set aside and by leave of court plaintiff filed an amended petition. Demurrer to the amended petition was overruled without prejudice. Evidence was taken, the case was referred to a commissioner for findings of fact, and the report of the commissioner was filed April 26, 1926. Plaintiff filed certain exceptions to the commissioner's report, and on the same day presented a motion to defer further action in the prosecution of the case. This motion, which was granted, was predicated upon the following memorandum signed by plaintiff's attorneys:

"Claimant is this day filing its exceptions to the commissioner's findings in this case, but respectfully asks leave to defer printing these exceptions and asks the court to defer taking any action on same pending action of the Supreme Court on writs of certiorari being filed in the three cases, *Lange and Bergstrom*, Nos. C–930 and C–931, and *H. P. Converse & Co.*, No. C–1202. If writs are denied in those cases motion to dismiss the present case will be made, as

Opinion of the Court

claimant could have no hope of favorable action by this court as long as this court's interpretation of the Supreme Court's decision in the *H. E. Crook Co. case* prevails."

The Supreme Court denied the writs in the three cases referred to in plaintiff's motion. No motion was made by plaintiff to dismiss, nor did counsel for the Government move for dismissal on account of plaintiff's stipulation, and the case was allowed to proceed. In its supplemental brief plaintiff offers through counsel an "explanation and apology for what might otherwise appear an anomalous situation," the suggestion that plaintiff itself "is unwilling to abide the then judgment of its counsel, and insists that the case proceed to trial on the merits."

In granting a motion of this character the court has the right to rely upon the stipulated conditions contained therein. Plaintiff's motion contained the declaration that plaintiff "could have no hope of favorable action by this court as long as this court's interpretation of the Supreme Court's decision in the *H. E. Crook Co. case* prevails," and further declared its purpose to move for a dismissal in the event the writs should be denied. It is fair to assume that in granting the motion the court was influenced by the express avowal of plaintiff's purpose to dismiss its action in the event the writs of certiorari should be denied, as offering the opportunity for a speedy disposition of the case.

The argument of plaintiff's counsel on the question of the applicability of the decisions mentioned in said motion is not convincing. This court entertains the same view now as was expressed in the opinion of the Chief Justice in sustaining the demurrer to the petition. The case is controlled by the *Crook Co. case*, 270 U. S. 4; *Merchants' Loan & Trust Co. case*, 40 C. Cls. 117; *Wells Bros. Co. case*, 254 U. S. 83; *Chas. F. Wood et al. case*, 258 U. S. 120, and other cases.

It is the judgment of the court that plaintiff's petition and amended petition should be and the same are hereby dismissed.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

NORFOLK SHIPBUILDING & DRY DOCK CORPORATION v. THE UNITED STATES

[No. C-51. Decided March 7, 1927]

On the Proofs

Contract; repairs to vessel used by the United States; release by the contractor.—Where under a contract with the Navy Department plaintiff made certain repairs to a vessel used by the United States, payment for which was thereupon disputed, upon completion of the work signed a release discharging the United States from all claims under the contract and received the amount agreed upon as owing to it for other repairs under the said contract, the plaintiff is not entitled to recover from the United States for the disputed items.

Same; manufacture of buoys; acceptance of 75% of the compensation.—Where a contractor accepts from the Navy Department an order for the manufacture of buoys, and upon completion of the work accepts, as part payment only, 75 per cent of the compensation awarded, it is entitled to recover sufficient to bring its compensation within a reasonable basis for the work performed.

The Reporter's statement of the case:

Mr. W. Warfield Ross for the plaintiff. *Good, Childs, Bobb & Westcott* were on the briefs.

Mr. Joseph Henry Cohen, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and doing business under the laws of the State of Virginia, with its principal office at Norfolk in said State.

II. On August 11, 1917, it entered into a contract with the defendant by which it agreed to furnish all the necessary material and labor and to do all the work of making repairs and alterations to such vessels as the Navy Department might, in the case of exigency, designate. A copy of said contract is attached to the amended petition as plaintiff's Exhibit A and is made a part hereof by reference.

III. Pursuant to said contract the plaintiff performed work upon and made repairs to many different vessels belonging to, or in the service of, the Government, for which service the plaintiff was in due course paid in accordance with the terms of the contract.

IV. During the life of the contract, and on April 19, 1918, the plaintiff received for repair the S. S. *Fenimore*, a vessel then in the service of the United States. The instructions relative to the repair of said vessel were contained in a letter of said date which is as follows:

INDUSTRIAL DEPARTMENT,
UNITED STATES NAVY YARD,
Norfolk, Va., April 19, 1918.

NORFOLK SHIPBUILDING & DRY DOCK COMPANY,
Norfolk, Virginia.

Subject: *Fenimore*—Items of repair.

GENTLEMEN: 1. In connection with contract entered into between your company and the Navy Department, whereby you are to perform naval work at cost plus profit, it is requested that you undertake the following items of work on the steamer *Fenimore:*

Item No. 1: Renew about 15 feet of outer stem, beginning lower side of upper fender.

Item No. 2: Renew one plank on port bow, at water line, length approximately 16 feet.

Item No. 3: Renew galvanized metal sheathing port and starboard side, from stem to wheelhouse, and repair sheathing aft of wheelhouse port and starboard, as found necessary.

Item No. 4: Renew damaged sections of sponsons, port and starboard side, approximately 150 square feet.

Item No. 5: Renew vertical sheathing (double course) in after end of starboard wheelhouse and repair ceiling. Renew the water baffle over access door starboard and port wheelhouse and renew water baffle in after end of starboard wheelhouse.

2. You are requested to keep separate cost data for items No. 1 and No. 4 in order that owners may be charged for such work as they are considered to be responsible for in connection with these two items.

3. It is considered that cost involved in connection with repairs to stem be divided 50 per cent to Government, 50 per cent to owners. The greater part of damage was due to steamer hitting dock, or some other obstruction, and only

partly due to damage by ice. This is the work covered by item 1.

4. The work involved in connection with repairs to item No. 4, repairing sponsons, port and starboard, was sustained, being hit by a barge or some other craft, and it is considered the owners are responsible for cost of this item of work.

5. To perform this work it will be necessary to dry-dock ship, which will be proceeded with; all cost of dry-docking the Government is considered responsible for. Damage necessitating work requiring dry-docking was caused by steamer running through ice.

Respectfully,

R. M. WATT,
Naval Constructor, United States Navy,
Industrial Manager.

V. On May 6, 1918, the said instructions were supplemented by the following letter:

INDUSTRIAL DEPARTMENT,
UNITED STATES NAVY YARD,
Norfolk, Va., May 6, 1918.

NORFOLK SHIPBUILDING & DRY DOCK CO.,
Norfolk, Va.

Subject: *Fenimore*—Repairs on.

GENTLEMEN: 1. In accordance with contract entered into between your company and the Navy Department, whereby you are to perform naval work at cost plus profit, it is requested that you undertake the following items of work on the *Fenimore*:

Item 1: Renew one section of handrail on upper deck, starboard side.

Item 2: Renew seven planks on the starboard side, forward.

Item 3: Renew three planks on the port side, forward.

Item 4: Renew yellow metal forward of the wheelhouse, port and starboard.

Item 5: Renew broken iron rods in wheelhouse.

Item 6: Patch small hole in topsides over window.

Item 7: Renew lead sleeve on condenser discharge valve, the cost of this work to be kept separate and to be paid for by the owners.

Item 8: Replace steering gear as directed. The cost of this item to be kept separate.

Respectfully,

R. M. WATT,
Naval Constructor, U. S. N.,
Industrial Manager.

VI. Later H. P. Eddy, jr., naval constructor, U. S. Navy, who was at that time a Government representative in charge of the work on the *Fenimore*, orally authorized the plaintiff to paint the engineroom of said vessel with one coat of paint, renew the braces in the wheels, ream holes and refit new bolts, and renew and alter feed lines to the boilers. These repairs had been requested by the captain and chief engineer of the vessel.

VII. All of the work and repairs referred to in the said written and oral instructions were performed in a workmanlike manner by the plaintiff and were accepted by the Navy Department. Payment therefor was made in accordance with the terms of the said contract, Exhibit A, with the following exceptions:

(1) The repairs represented by item 4 of said letter of April 19, 1918;

(2) The repairs represented by item 7 of the letter of May 6, 1918;

(3) The repairs represented by item 8 of said letter of May 6, 1918; and

(4) The repairs represented by the verbal instructions referred to in Finding VI.

VIII. Following the completion of said work named in the exceptions above and its acceptance as satisfactory by the Navy Department, the plaintiff in due time presented its bill therefor to the Navy Department. The latter thereupon requested the plaintiff to collect the same from the Hudson Navigation Company, representing that the said company was the owner of the vessel and that these items were properly chargeable to it under the contract between it (Hudson Navigation Company) and the Government. The plaintiff thereupon made demand upon the said Hudson Navigation Company for payment on said items, but the Hudson Navigation Company refused to pay for the same on the alleged ground that the work was not properly chargeable to it but was properly chargeable only to the defendant.

IX. The plaintiff thereupon renewed its demand upon the Navy Department for payment on said charges, but the same was refused.

Reporter's Statement of the Case

X. The plaintiff represents said charges for the repairs of the S. S. *Fenimore* in the following form:

Renewing damaged sections of sponsons:		
Direct labor	$1,008.47	
50% of direct labor	504.24	
Direct material	101.38	
10% of material	10.14	
Machine tool charges	19.90	
	1,644.13	
10% for profit	164.41	
Launch	6.00	
Lighters	15.39	
Total		$1,829.93
Renewal of lead sleeve of condenser discharge valve:		
Charges of L. A. Hall, subcontractor	21.18	
10% for profit	2.12	
Total		23.30
Replacement of steering gear:		
Direct labor	238.77	
50% of labor	119.39	
Direct material	75.18	
10% of material	7.52	
Machine tool charges	67.29	
	508.15	
10% for profit	50.82	
Total		558.97
Painting engine room, etc:		
Direct labor	617.46	
50% of labor	308.73	
Direct material	88.81	
10% of material	8.88	
Machine tool charges	37.90	
10% for profit	106.18	
Total		1,167.96
Total for repairs of S. S. *Fenimore*		3,580.16

The above figures represent the actual costs and profits in accordance with the method of computation used in contract, Exhibit A. The above figures also represent the usual, customary, and reasonable charges for such work at the time and place performed.

XI. During the existence of said contract, and on April 17, 1918, the plaintiff received the following letter:

FIFTH NAVAL DISTRICT,
April 17, 1918.

NORFOLK SHIPBUILDING & DRY DOCK CORP.,
Norfolk, Va.

Subject: Cylindrical mooring buoys.
Enclosure: (Under separate cover) (A) Norfolk plan No. 23612, cylindrical mooring buoy—1 B/P.

GENTLEMEN: In accordance with contract entered into by your company and the Navy Department, whereby you were to undertake work on a cost-plus profit basis, it is requested that you construct one mooring buoy in accordance with plan forwarded as enclosure (A).

If this buoy, upon test, proves satisfactory for the purpose intended, it is contemplated to construct about thirty (30) in all, further instructions regarding the manufacture of which will be issued to you.

Respectfully,

R. M. WATT,
Naval Constructor, U. S. N.,
Industrial Manager.

The plaintiff commenced work on such buoy, and after completion of the same and testing it, received the following letter:

FIFTH NAVAL DISTRICT.

NORFOLK SHIPBUILDING & DRY DOCK CORP.,
Norfolk, Va.

Subject: Manufacture of mooring buoys.

GENTLEMEN: In accordance with contract entered into by your company and the Navy Department, whereby you are to undertake work on a cost-plus-profit basis, you are requested to manufacture one mooring buoy in accordance with plan No. 23612, with the following change: Make the body of the buoy 8″ longer and fill with 1,150 pounds of cement and sand.

Respectfully,

R. M. WATT,
Naval Constructor, U. S. N.,
Industrial Manager.

The plaintiff thereupon proceeded to and did manufacture the second mooring buoy in accordance with said plan as amended, which mooring buoy proved satisfactory.

Reporter's Statement of the Case

It does not clearly appear in what manner the instructions for the manufacture of the 30 buoys mentioned in the letter of April 17, 1918, were given plaintiff, but it does appear that the plaintiff manufactured said 30 buoys in accordance with said plan as amended and said buoys were accepted as satisfactory to and thenceforth used by the defendant.

XII. Toward the end of the time required for the manufacture of said buoys the plaintiff was requested to submit an estimate of the cost of the work. It submitted such an estimate, giving as the amount estimated $36,000, and representing that the said cost to the defendant would not vary more than $200 from the said estimate. Nothing whatsoever was done by the defendant with respect to acceptance or rejection of the said estimate, and following the delivery and acceptance of said 32 mooring buoys, the plaintiff submitted its bill for said work in the sum of $35,777.74, which it represents in the following manner:

32 cylindrical mooring buoys:

Direct labor	$15, 095. 85
50% of labor	7, 547. 92
Direct material	4, 365. 19
10% of material	436. 51
Machine tool charges	4, 380. 03
Subcontractors	598. 34
Total	32, 423. 84
10% for profit	3, 242. 39
Retroactive labor, net	105. 51
Launch hire, net	6. 00
Total	35, 777. 74

These charges represent the usual, customary, and reasonable charge for such work at the time and place performed.

On July 19, 1919, the defendant, by letter, advised the plaintiff that the services rendered in the matter of the buoys had not been properly authorized and that reimbursement would be made therefor not on the basis of cost plus under the contract but on the basis of value only. The defendant therein offered to pay $27,158.45, which the plaintiff refused.

XIII. On September 11, 1919, the defendant issued its regular form of Navy order to the plaintiff covering the 32 buoys in which it was stated that just compensation was to

be paid on the basis of cost plus and that the determination of just compensation was $25,283.57. The plaintiff accepted the order, but said the amount was not satisfactory, and defendant thereupon paid plaintiff the sum of $18,962.68, which represented 75 per cent of the amount in the order designated.

XIV. The items of charge claimed in relation to the repairs of the S. S. *Fenimore* and in relation to the manufacture of the buoys were thereafter made the subject of frequent communications between the plaintiff and the defendant. At the same time the plaintiff had other claims against the defendant arising out of other items of repair on the said S. S. *Fenimore*. These other charges for items of repair not involved in this action were the subject of a suit which had been brought by the plaintiff against the defendant in the Court of Claims, No. A–44, which said items were finally adjusted and an agreement reached that there was due and owing to the plaintiff for the same the sum of $59,775.92. The plaintiff, as a precautionary measure, in the release of the claims sued for in case A–44, made a reservation of its right to sue for the payment of such items as it herein claims. The defendant refused to accept said release in the form offered by the plaintiff and the said reservations were stricken therefrom and the release as finally signed appeared in the following form:

28905–011/155–56
S/T/C

RELEASE—CONTRACT NO. 736

Whereas by a certain contract, dated August 11, 1917, by and between the Norfolk Shipbuilding & Dry Dock Corporation, of Norfolk, Virginia, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, it is agreed that the party of the first part will repair and make alterations for the Navy to such vessels as might be sent to its works for that purpose; and

Whereas by paragraph five, page six, of said contract the party of the first part agrees to execute a final release to the department, in such form and containing such provisions as shall be approved by the Secretary of the Navy, of

all claims against the United States arising under or by virtue of said contract; and

Whereas all work on vessels sent to the company's yard for repairs and alterations under said contract has been completed and said contract has been canceled by the department on September 19, 1919; and

Now, therefore, in consideration of the premises and the payment at this time to the party of the first part in full for said Navy repairs, the said party of the first part does hereby undertake, promise, and engage to and with the party of the second part, as follows, viz:

The said party of the first part, for itself, its successors, and assigns, does hereby remise, release, and forever discharge the United States of and from all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands whatsoever in law or in equity for or by reason of or on account of work done under said contract or on account of the cancellation thereof.

In witness whereof the Norfolk Shipbuilding & Dry Dock Corporation has caused its corporate name to be hereunto subscribed and its seal hereto affixed this 30th day of June, 1921.

NORFOLK SHIPBUILDING & DRY DOCK CORP.
By GEO. W. ROPER, *President.*

Attest:
C. S. ROGERS,
Asst. Secretary.

Signed, sealed, and delivered in presence of—
A. D. GLASS,
E. S. MOSER.

Navy Department, June 30, 1921. Form approved. Edwin Denby, Secretary of the Navy. (G. E.)

On the execution of the release in said form the plaintiff received payment of the said sum of $59,775.92.

The court decided that plaintiff was entitled to recover, in part.

HAY, *Judge*, delivered the opinion of the court:

The plaintiff in this suit seeks to recover from the United States the sum of $20,395.22, made up of two items, one of $3,580.16 which it claims was due it for repairs to the S. S. *Fenimore* under its contract with the United States, which contract is attached to the petition marked Exhibit A, and is made a part of the findings. The other item is the sum of

Opinion of the Court

$16,815.06, the balance due the plaintiff for the manufacture of certain buoys which the United States ordered and upon completion thereof accepted and used.

As to the first item: It is made up of certain charges for work done under the contract. The contract provided for repairs which the United States might require to be done on vessels designated by it. The S. S. *Fenimore* was a vessel which the United States was in possession of and using during the life of the contract, and the repairs which the plaintiff made on it were ordered by the Government to be made under the contract aforesaid. After the repairs were made on the S. S. *Fenimore* there were frequent communications between the parties as to the amount due by the Government for said repairs; and there were other claims than the one in suit which were in dispute. Finally a suit was brought in this court by the plaintiff for items of repair on the S. S. *Fenimore*. These items so sued on did not include the items of charge involved in the instant case.

On June 30, 1921, the plaintiff executed a release of all claims against the United States under and by virtue of said contract, and thereupon the Government paid to the plaintiff the sum of $59,775.92, and the plaintiff dismissed its suit. The release provided that the plaintiff released and discharged the United States from "all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands whatsoever in law or in equity for or by reason of or on account of work done under said contract." In the negotiations leading up to said settlement the plaintiff sought to insert in said release a provision reserving its right to sue for the payment of the items of charge for the repairs to the S. S. *Fenimore* which it has included in this suit. The Government refused to accept the release in that form and the reservation sought to be made by the plaintiff was stricken from the release, and the plaintiff signed the release as it appears in Finding XIV and as it is above quoted.

We are of opinion that the items herein sued for were made in pursuance of the contract and that they were in part the subject of the negotiations which culminated in the payment of $59,775.92 and the signing of the release by the plaintiff. The plaintiff is bound by the terms of the release

Syllabus

and can not maintain its suit for the items making up its claim of $3,580.16.

As to the second item of $16,815.06: This item grew out of an order issued by the Navy Department in the regular form to the plaintiff for the manufacture of 32 buoys. The said order stated that just compensation had been determined to be the sum of $25,283.57. The plaintiff accepted the order but stated that the just compensation was not satisfactory; the defendant thereupon paid the plaintiff the sum of $18,962.68, which was 75 per cent of the amount designated by the defendant as just compensation.

We think the evidence clearly shows that the sum of $35,-777.74 was the reasonable charge for such work at the time and place performed, and have so found in Finding XII. Therefore a judgment will be entered for the plaintiff in the sum of $16,815.06, the balance due after crediting the defendant with the amount already paid to the plaintiff. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

NATIONAL LIFE INSURANCE CO. v. THE UNITED STATES[1]

[No. E-430. Decided March 7, 1927]

On the Proofs

Income tax; life insurance companies; deductions from gross income; excess over deductible interest of 4% of mean of reserve funds.—The deduction from gross income of life insurance companies, authorized by section 245 (a) (2) of the revenue act of 1921, of an excess over deductible interest of 4 per cent of the mean of reserve funds, does not impose a tax upon interest which under the Constitution would be exempt from taxation, nor does it, within the meaning of the constitutional requirement of geographical uniformity, discriminate between taxpayers.

[1] Writ of certiorari granted.

The Reporter's statement of the case:

Messrs. J. Harry Covington and *Moorfield Storey* for the plaintiff. *Mr. George B. Young* and *Covington, Burling & Rublee* were on the briefs.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Mr. Charles E. Hughes, in behalf of companies defending the case as *amici curiae.*

The court made special findings of fact, as follows:

I. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Vermont, and at all times during and since the year 1921 has been engaged in business as a life insurance company.

II. On March 11, 1922, plaintiff filed with the collector of internal revenue for the district of Vermont a tentative return of the income received by it during the calendar year 1921, which showed an estimated income tax amounting to the sum of $91,337.60, and paid thereon, on or about March 11, 1922, under protest, the sum of $22,834.40.

III. Thereafter, on or about June 11, 1922, plaintiff filed an amended return showing no tax due, plaintiff's computation thereon being as follows:

GROSS INCOME

Items		
1. Interest from all sources (including tax exempts)		$3, 811, 132. 78
2. Dividends on stock of domestic and foreign corporations.		
3. Rents		13, 460. 00
4. Total items 1 to 3		3, 824, 592. 78
Deductions		
5. Interest exempt from taxation	$1, 125, 788. 26	
6. 4% of the mean of the reserve funds	2, 695, 279. 12	
8 to 13. Miscellaneous deductions	204, 411. 67	
14. Total of items 5 to 13		4, 025, 479. 05
15. Net loss		200, 886. 27

Reporter's Statement of the Case

IV. Plaintiff was thereafter required by the collector of internal revenue for the district of Vermont to file, and did file under protest, a second amended return, wherein the taxable income of plaintiff was computed as follows:

GROSS INCOME

Items		
1. Interest from all sources (including tax exempts)		$3,811,132.78
2. Dividends on stock of domestic and foreign corporations.		
3. Rents		13,460.00
4. Total items 1 to 3		3,824,592.78
Deductions		
5. Interest exempt from taxation	$1,125,788.26	
6. Excess of 4% of the mean of the reserve funds over item 5	1,569,490.86	
8 to 13. Miscellaneous deductions	204,411.67	
14. Total of items 5 to 13		2,899,690.79
15. Net income		924,901.99
Total tax		92,490.20

The rate of tax provided by the revenue act of 1921, section 230, was 10 per cent, so that upon such return the total tax as found and determined by the Commissioner of Internal Revenue and thereafter duly assessed was the sum of $92,490.20, together with interest in the sum of $5.09 upon the deficiency of plaintiff's first quarterly payment, making a total assessment for the calendar year 1921 against said plaintiff of the sum of $92,495.29.

V. The mean of plaintiff's reserve funds required by law and held at the beginning and end of the year was $67,381,-977.92, 4 per cent of which amount is $2,695,279.12, and interest exempt from taxation received by the plaintiff during the year 1921 amounted to the sum of $1,125,788.26, of which $873,075.66 was interest upon obligations of the several States and political subdivisions thereof, and of which $252,-712.60 was interest upon obligations of the United States, which, according to the respective statutes under which they were issued and by their terms were exempt from the normal Federal income tax.

Opinion of the Court

VI. Various miscellaneous items deductible under the revenue act of 1921 from plaintiff's gross income for said calendar year 1921 in arriving at its net income amounted to $204,411.67.

VII. Plaintiff's gross income for the calendar year 1921 by way of interest from all sources, including interest exempt from taxation of $1,125,788.26, amounted to the sum of $3,811,132.78, to which was added gross income from rents in the sum of $13,460.00, making a total gross income, including tax exempt interest, of $3,824,592.78.

VIII. Plaintiff paid to the collector of internal revenue under protest said sum of $92,495.29 (including $5.09 interest) as follows:

March 11, 1922	$22, 834. 40
June 11, 1922	23, 415. 79
September 12, 1922	23, 122. 55
December 13, 1922	23, 122. 55

IX. Plaintiff duly filed with the collector of internal revenue claims for refund of the several amounts paid by it set forth in Finding VIII hereof on July 10, 1922, as to the payments made March 11, 1922, and June 11, 1922, respectively; on September 12, 1922, as to the payment made that date; and on October 16, 1923, filed claim for refund for $92,495.29, the total amount paid. Said claims for refund were duly rejected by the Commissioner of Internal Revenue prior to the filing of this suit.

X. These payments, aggregating said sum of $92,495.29, were duly paid into the United States Treasury and no part of said sum has ever been repaid to said plaintiff, but said sum is still retained by the United States.

The court decided that plaintiff was not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This is an action to recover an amount the plaintiff was required to pay as taxes which it is alleged were illegally exacted. The facts are stipulated. The plantiff is a corporation engaged in business as a life-insurance company. It

Opinion of the Court

filed a tentative return of its income for the year 1921, and in March, 1922, paid a tax under protest. Thereafter, in June, 1922, it filed an amended return, but the collector of internal revenue required it to file a second amended return. Item 6 in the two amended returns is here set forth and shows the difference between the claims of the parties:

(1) 4% of the mean of the reserve funds_____________ $2, 695, 279. 12
(2) Excess of 4% of the mean of the reserve funds over item 5____ 1, 569, 490. 86

The question is whether plaintiff can recover the tax of $92,490.20 with the addition of a small item of $5.09 stated in the second amended return, being the amount it was required to pay.

The tax in question is controlled by the revenue act of 1921 (42 Stat. 261), which provides a special method for ascertaining the "taxes on insurance companies." Section 242 defines the term "life-insurance company," and section 243 imposes a tax in lieu of taxes imposed by section 230 (the corporation tax) and section 1000 (capital-stock tax) and Title III (war-profits and excess-profits tax). It imposes on a domestic life-insurance company "the same percentage of its net income as is imposed upon other corporations by section 230," that is, 10 per cent. Section 244 provides that in the case of a life-insurance company the term gross income means the gross amount of income received during the taxable year "from interest, dividends, and rents." Plainly these specific items are not inclusive of all the sources of income to a life-insurance company, nor are they broad enough to cover "gains or profits and income derived from any source whatever," used in section 213 when referring to gross income of individuals—a section that is made applicable to "gross incomes" of corporations by section 233. The gross income of the life-insurance company is thus limited to three sources, and the net income, which alone is taxed, is this income from three sources, less certain authorized deductions stated in section 245 (a) under nine separate paragraphs. The deductions authorized by paragraphs (1) and (2) are the material ones in this case and are as follows:

Opinion of the Court

"(1) The amount of interest received during the taxable year which, under paragraph (4) of subdivision (b) of section 213, is exempt from taxation under this title."

"(2) An amount equal to *the excess, if any, over the deduction specified in paragraph (1) of this subdivision, of* 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year."

We italicize certain words in the paragraph for convenience of reference. There is no question as to the mean of the reserve. The amount is stipulated to be $67,381,977.92, 4 per centum of which is $2,695,279.12. The interest exempt from taxation under paragraph (1) is interest on State or municipal bonds and certain Federal securities. It amounted to $1,125,788.26, and in accordance with paragraph (1) was deducted from the gross income as item 5 in both of the amended returns. Including this amount the gross income was $3,824,592.78.

As shown by the two amended returns (item 6), the controversy turns upon the effect to be given paragraph (2) of section 245(a) above quoted. In this paragraph the plaintiff is allowed a deduction which it contends should be 4 per centum of the mean of its reserve funds, while the Government contends that the deduction is not 4 per centum of these funds but "an amount equal to the excess" of 4 per centum of them over the amount of the interest from the tax-free securities. Paragraph (2) certainly uses the word "excess," which, according to Webster's Dictionary, means "the amount by which one thing or number exceeds another." The amount of one of these things is ascertained by taking 4 per centum of the mean of the reserve funds (stipulated to be $2,695,279.12) and the other of these things is ascertained by taking the amount of the interest on certain securities (stipulated to be $1,125,788.26). The difference between these amounts shows what excess is authorized to be deducted, and unless the 4 per centum of the reserve is in excess of the other factor, there is no deduction to be made under this paragraph. It is apparent that if the deduction is to be ascertained by recourse to the language used the position of the plaintiff is not tenable. The words used are plain and unambiguous. It further states, however, its fundamental contention to be that in so far as the act purports to

authorize the exaction of the sum in question "it is repugnant to the Constitution, in that it attempts to tax the income of tax-free securities, and is not referable to any power granted to Congress." We do not understand the contention to go to the extent, in one phase of the case, of urging as unconstitutional all of paragraph (2). Because if this end be attained and the whole paragraph be stricken down without affecting the others, the result would be that plaintiff would not be entitled to the deduction of item 6 in either of the returns. The argument proceeds upon the theory that the part of the paragraph (that part we have italicized) is void, though effect may be given to the balance of it. This will be adverted to later. It is sufficient here to say that it is urged by plaintiff that interest on tax-free securities being nontaxable, "it is a breach of the taxpayer's rights to include in the gross income upon which the tax is based interest on State and municipal bonds." It is to be conceded that interest on State and certain other bonds is not taxable, but that such interest does actually constitute a part of the gross income of its recipient is a truism. It is not a part of taxable income, and the act does not attempt to tax this interest or "gross income." It defines "gross income" as something less than the life-insurance company's actual income, but the tax is imposed upon "the net income of every life-insurance company" (sec. 243).

This term "net income" is defined to mean the gross income, as defined by the statute, less certain authorized deductions, the first of which is the amount of interest received during the taxable year from tax-free securities. So that if this interest is first treated as part of the gross income it is immediately deducted, and if there were no other authorized deductions it is manifest that there could be no basis for a claim that the interest on tax-free securities is taxed. To include this interest in the gross income and then to deduct the amount of it to ascertain the taxable net income produces the same result that would be reached if this interest had not been included in the gross income in the first instance. In neither event is it taxed. But since there are a number of other deductions authorized to be made from the aggregate of "the interest, dividends and rents" constituting the gross

income, the amount remaining after the tax-free interest is deducted must be kept in view. No objection is taken to the deductions except paragraph (2), the others, which may be designated as miscellaneous deductions, being taken from the "gross income" to reach the net. As to the deduction authorized by paragraph (2) it is said by plaintiff that "it virtually destroys the exemption" of tax-free securities when held by insurance companies, that it produces a "glaring discrimination" between life-insurance companies and individuals and between various life-insurance companies themselves.

The contention, it seems to us, confounds what is taxed with what is deducted. As already stated, the tax-free interest being authorized to be and actually deducted from the gross income there can be no pretense that this element is subjected to a tax imposed on what remains. The principle securing this right of exemption from taxation does not extend to conferring a right to have the exemption counted twice. The paragraph provides a deduction defined to be the amount of the excess of one ascertainable amount over another, and the plaintiff contends that this virtually destroys the value of the deduction of tax-free interest already made because it argues the provision is that the deduction of 4 per centum of the reserves "to which all life-insurance companies are entitled" is to be diminished by the amount of this tax-free interest. What basis there is for this statement that all life-insurance companies are entitled to a deduction of 4 per centum of the reserves does not appear. It is not stipulated and we do not find it in the act. Paragraph (2) makes it an element in ascertaining the "excess" that may be deducted from the "gross," and if a company has no tax-free interest to deduct from the 4 per centum it of course secures a larger deduction under this item than a company having such interest can secure under the same item. But how can that affect the deduction which the owner of the tax-free interest has already taken? The question resolves itself into whether the act is void because of discrimination. Before considering this let us advert to a contention above suggested that the

Opinion of the Court

constitutionality of paragraph (2) could be upheld by striking therefrom the words we have italicized, and thus leave the right to a deduction of 4 per centum of the reverse instead of the "excess" mentioned. It is recognized that effect should be given to the legislative intent, and it is not questioned that the intent is primarily to be found in the language of the enactment.

The rule has been thus stated: "As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected or dependent on each other in subject matter, meaning or purpose, that the good can not remain without the bad. The point is * * * whether the provisions are so interdependent that one can not operate without the other." *Loeb* v. *Township Trustees*, 179 U. S. 472, 490. "But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them." *Allen* v. *Louisiana*, 103 U. S. 80, 84. "The point to be determined," it is further said (p. 84), "in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature." See *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126, 138; *Supervisors* v. *Stanley*, 105 U. S. 305, 312; *Reagan* v. *Farmers Loan*, 154 U. S. 362, 395. Tested by these rules there can be no doubt that the provisions of paragraph (2) are inseparable. Neither can be eliminated and leave a basis for ascertaining the deduction. It can not be said that Congress would have enacted the paragraph with the italicized words deleted. They had the right to author-

ize a deduction and the courts are without power to make a different one. This brings us to the question of the constitutionality of the entire paragraph (2). As already stated, it is not subject to the objection that it taxes the income from tax-exempt securities. Nor is it subject to the objections that it is void because of supposed discriminations. The class of life-insurance companies coming within the provisions of section 242, to which plaintiff belongs, are all treated alike, so far as they are similarly circumstanced, though an extreme case such as plaintiff uses to illustrate its contention may show that one company may have a deduction of 4 per centum of its mean reserves, while another company may get no deduction under paragraph (2). But if in application, the authorized deduction, in particular instances, may seem to bear upon one life-insurance company more than upon another this is due to differences in their circumstances and not to any uncertainty or want of generality in the tests applied. See *LaBelle Iron Works case*, 256 U. S. 377, 393. The established doctrine is that the requirement of uniformity prescribed by the Constitution refers only to geographical uniformity. See *Knowlton* v. *Moore*, 178 U. S. 41, 98, 106; *Billings case*, 232 U. S. 261, 282; *Barclay* v. *Edwards*, 267 U. S. 442, 450.

The revenue act of 1918 was attacked in *Barclay* v. *Edwards*, 267 U. S. 442, and the revenue act of 1921 in *National Paper & Type Co.* v. *Bowers*, 266 U. S. 373, the two cases being heard at the same time because the same question was presented in both. In *Barclay* v. *Edwards* it is said: "The power of Congress in levying taxes is very wide, and where a classification is made of taxpayers that is reasonable, and not merely arbitrary and capricious, the Fifth Amendment can not apply. As this court said, speaking of the taxing power of Congress, in *Evans* v. *Gore*, 253 U. S. 245, 256: 'It may be applied to every object within its range "in such measure as Congress may determine;" enables that body "to select one calling and omit another, to tax one class of property and to forbear to tax another;" and may be applied in different ways to different objects so long as there is "geo-

graphical uniformity" in the duties, imposts and excises imposed.'"

The classification of life-insurance companies by the revenue act of 1921 does not furnish a basis for plaintiff's objection, and the injustice thought to be worked by the act by reason of its operation as between the insurance companies affected "is an argument, not for the constitutional invalidity of the law before a court, but for its repeal before Congress." *Barclay* v. *Edwards*, *supra* (p. 451).

That the act in referring to life-insurance companies makes a distinction between them and other corporations and individuals is not to be questioned when their gross income is by section 244 limited to "interest, dividends, and rents." The income of individuals is from "whatever source derived." Is this a discrimination that strikes down the entire scheme for taxing life-insurance companies? They are not taxed as other corporations are taxed, but that does not impair the validity of the sections imposing the tax. As already suggested, it would seem that the definition given in section 242 itself limits the number of the companies that are affected by the following sections. The circumstances that one company may have more tax-exempt securities than another company has, or that one company may have none, is not something a court may seize upon to strike down a plan devised for the taxation of the class of life-insurance companies. *La-Belle Iron Works*, *case*, *supra*. The deduction of a percentage of mean reserves must rest in congressional action. It is not a constitutional right or one existing outside of the statute.

An exemption from taxation of the interest arising from State and municipal bonds and tax-exempt Federal bonds is a right which may not be impaired, but when this right is recognized and applied as it is in paragraph (1) the court is powerless to prevent the use of the amount of this interest as an element in measuring the extent of the additional deduction allowed by paragraph (2). We find nothing in the case of *Miller* v. *Milwaukee*, decided January 3, 1927, by the Supreme Court, 272 U. S. 713, that militates against our con-

clusion. In that case, involving the construction of a State statute, plaintiff's testator was a stockholder in a Wisconsin corporation that owned tax-exempt bonds of the United States. The interest on these bonds was collected by the corporations and was credited to their surplus. It was subsequently distributed as dividends to the stockholders. The corporations were not taxed for the amount of this interest, it being treated as exempt in the hands of the corporation. The law of Wisconsin provided, however, that, while the stockholders were not taxed upon dividends received from corporations, the income of which was assessed, yet where only part of the income was assessed by the corporation then only a corresponding part of the dividend received therefrom should be deducted from the income taxed to the stockholder. The law was condemned as an attempt to tax the interest received from Government bonds. But we have no such case. There is not the slightest basis for the claim that the interest on the bonds, State and Federal, is not exempt under the act in question, nor, as has been shown, is it taxed because of paragraph (2). It is urged for the Government that in any event the tax in question is an excise tax. We do not pass upon that question, because, treating it as an income tax, we think the plaintiff must fail. The court has not made a finding requested by plaintiff to be added to the stipulation of facts. This relates to a statement by the "tax adviser of the Treasury Department" before the Committee on Finance of the Senate when it was considering the tax bill which eventuated in the act of 1921. The full statement of this witness covers several printed pages of the "hearings before the Committee on Finance" on H. R. 8245 in September, 1921. We think this document is not material or competent in this case, but it is as available as a public document to another court as it is to this court, and in any event has no place in the court's findings of ultimate facts.

Our conclusion is that the petition must be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

STOCKBRIDGE TRIBE OF INDIANS v. THE UNITED STATES

[No. F-202. Decided March 7, 1927]

On Demurrer to Petition

Res adjudicata.—This suit being essentially the same as that decided by the court January 25, 1926, 61 C. Cls. 472, and all the questions raised herein having been dealt with in said prior suit, the matter sued upon is *res adjudicata.*

The Reporter's statement of the case:

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.
Mr. Dennison Wheelock, opposed.

The material averments of the petition are set forth in the opinion, together with a statement of the former adjudication.

HAY, *Judge*, delivered the opinion of the court:

The defendant has demurred to the petition of the plaintiff in this case.

The petition alleges that this suit is brought by virtue of the act of Congress approved June 7, 1924, 43 Stat. 644, which is the act conferring upon this court jurisdiction to hear and determine any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Stockbridge Tribe of Indians, or arising under or growing out of any act of Congress in relation to Indian affairs.

The petition further alleges that pursuant to the provisions of the act of February 6, 1871, part of the two townships of land set apart for the use of the Stockbridge and Munsee Tribe of Indians by the treaty of February 5, 1856, has been taken and sold by the defendant for the net sum of $169,883.22. The petition further alleges that out of this

sum there is due to the tribe the sum of $131,612.52, the interest on which at 5 per cent from June 17, 1875, amounts to the sum of $329,031.50; that the total sum, amounting to $460,644.02, is the amount due the Stockbridge Tribe of Indians under the provisions of the act of February 6, 1871; that no part of this amount has been paid to the said tribe or accounted for by the defendant, except the sum of $112,-164.99 of principal and $159,206.80 of interest, leaving due the said tribe the sum of $179,272.17, for which sum this suit is brought.

The records of this court show that on August 6, 1924, a petition numbered D–552 was filed by this plaintiff under the authority of the jurisdictional act approved June 7, 1924, and that on May 1, 1925, the said petition was amended, and that the case was decided by this court on January 25, 1926, the said petition having been dismissed.

The petition now under consideration and the petition in D–552 are both based upon the same act, to wit, the act of February 6, 1871, 16 Stat. 405, and that both suits are brought to recover the same thing, to wit, the amount due the Stockbridge Tribe of Indians for which the two townships of land were sold, which is alleged to be the sum of $169,883.22.

There is no difference between the two suits except that in this case a different theory is set up in order to arrive at the amount of the unpaid balance alleged to be due, but in all essentials the two suits are the same. In D–552 all the questions raised in this petition are dealt with, both in the findings and in the opinion, and we are of opinion that the matter is *res adjudicata*, and that the petition of the plaintiff must be and the same is hereby dismissed. It is so ordered. See section 179 Judicial Code.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

Opinion of the Court

CREEK NATION v. THE UNITED STATES [1]

[No. F-168. Decided March 7, 1927]

On Demurrer to Amended Petition

Indian treaties; jurisdiction under act of May 24, 1924; setting aside of treaty on ground of duress.—The act of May 24, 1924, confers jurisdiction on the Court of Claims to hear and "render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe." It does not give jurisdiction over a claim the allowance of which involves the setting aside of a treaty on the ground that it was entered into under duress.

The Reporter's statement of the case:

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Messrs. E. J. Van Court and *Chester I. Long*, opposed. *Messrs. George E. Chamberlain, Peter Q. Nyce, W. E. Stanley, Samuel W. McIntosh, J. D. Houston, Austin M. Cowan, Claude I. Depew*, and *James C. Norton* were on the briefs.

The original petition in this case was dismissed January 10, 1927, on demurrer. Thereafter, on motion made therefor, the dismissal was set aside and leave granted to file an amended petition. A demurrer to the amended petition was sustained and the amended petition dismissed March 7, 1927. The material averments of the original and amended petitions are reviewed in the opinions of the court, which follow.

CAMPBELL, *Chief Justice*, delivered the opinions of the court:

ON DEMURRER TO ORIGINAL PETITION

An act of Congress approved May 24, 1924, 43 Stat. 139, conferred jurisdiction on the Court of Claims to hear "and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or

[1] Writ of certiorari denied.

Tribe," with certain limitations not material here. Section 2 of the act apparently contemplates one suit to be filed within five years from the date of the approval of the act but a later enactment authorizes the claims to be presented in separate suits. (44 Stat. 568.) A petition has been filed under these acts on behalf of the Creek Nation to which the Government has demurred. The case is before the court upon this demurrer.

After stating some of the early history of the Creeks or Muscogees and referring to the treaty of 1790, 7 Stat. 35, the petition proceeds to state the situation of the Upper and Lower Creeks during the War of 1812 and what is known as the "Creek War," and avers that the Upper Creeks were hostile while the Lower Creeks remained loyal to the United States. It is averred that upon the restoration of peace General Pinckney was authorized to conclude a treaty of peace "with the Creeks who had been engaged in hostilities against the United States," and that on the 10th day of July, 1814, General Jackson succeeded General Pinckney and was directed to conclude a treaty of peace under the instructions that had been given the latter, but that notwithstanding these instructions authorizing him to conclude a treaty with the hostile Creeks, alone, "he, by force and threats, threatening to put Tustunnuggee Thlucco (Big Warrior), the speaker of the Nation, in irons unless he called together his council * * * and by force, threats, and intimidation undertook to force the representatives of the said Creek Nation to execute a treaty conveying" over twenty-three millions of acres of the Creek Nation domain.

It is averred that the representatives of the Creek Nation met, all of them, with one exception, being friendly and not hostile to the United States, and protested to General Jackson that the lands were perpetually guaranteed to the Creek Nation by treaty, that the hostile Creeks had no interest in the fee to the lands, and that the treaty as drawn did not provide any compensation for the lands required to be ceded. It is further alleged "that said Jackson represented to said council that he was without power to make any agreement to compensate them for their lands and that unless they signed the treaty as he had drawn it he would furnish the

whole tribe with provisions and ammunition and that they could go down to Pensacola and join the Red Sticks and British and that, by the time they got there, he would be on their tracks and whip them and the British and drive them into the sea," and that driven to this extremity they submitted and signed the treaty, a copy of which is attached to the petition. The petition seeks payment for the twenty-three millions and more acres of land at "the minimum value of said land on the 9th day of August, 1814," which is averred to be $1.25 per acre, with interest from that date.

As above stated, the claims which the jurisdictional act authorizes the court to hear and determine are those "arising under or growing out of any treaty or agreement" between the United States and the Creek Nation. This assumes the existence of a treaty or agreement and the possibility of a claim under it, but the act nowhere authorizes the court to set aside a treaty alleged to have been made under duress or produced by threats. The claim here asserted is not one arising from the treaty or growing out of one, but involves the ignoring of the treaty itself. It can not be asserted at once as a claim under the treaty and a claim against the treaty.

By section 153, Judicial Code, it is provided that the jurisdiction of this court shall not extend to any claim against the Government (not pending therein on December 1, 1862) "growing out of or dependent on any treaty stipulation" with the Indian tribes. Construing this provision in *United States* v. *Weld*, 127 U. S. 51, 57, the Supreme Court say: "In order to make the claim one arising out of a treaty within the meaning of section 1066, Revised Statutes (153 Judicial Code), the right itself, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation." While the jurisdictional act removes the bar of this section 153, and authorizes the court to hear and determine certain kinds of claims, it describes them, as already stated, in language similar to that construed in the *Weld case, supra*. In the *Old Settlers case*, 148 U. S. 427, 469, the Supreme Court say: "The settlement of a controversy arising or growing out of these Indian treaties or the laws of

Opinion of the Court

Congress relative thereto and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws or holding them inoperative on the ground alleged."

In this same case (p. 468) is also to be found the following language applicable to the plaintiff's contention in the present case: "Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision, by authorizing the stipulation in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference." Congress has not clothed this court with power to annul the treaty on the ground of fraud or duress in its execution, and has limited the inquiry to claims "arising under or growing out of" a treaty or agreement. See also *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 567. In *Otoe & Missouria Indians* v. *United States*, 52 C. Cls. 424, there was an act quite as broad as that in the instant case, and this court said, page 429, "That this [act] does not give this court jurisdiction to inquire into the inequity or impropriety of any of these treaties between these Indians and the United States is so obvious as to hardly need citation of authorities."

Speaking of the jurisdictional act of March 2, 1895, 28 Stat. 898, which authorized suit in the Court of Claims, so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw Nations and certain affiliated bands "shall be fully considered and determined and to try and determine all questions that may arise on behalf of either party," the Supreme Court say: "It is thus clear that the Court of Claims was without authority to determine the rights of parties upon the ground of mere justice and fairness, much less under the guise of interpretation, to depart from the plain import of the words of the treaty. * * * To hold otherwise would be to practically recognize an au-

thority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians, which it is the function alone of the legislative branch of the Government to determine." *United States v. Choctaw, etc., Nations*, 179 U. S. 494, 535. The claim set up in the petition is not such a claim as is authorized by the jurisdictional act. As further pointed out by the Government, by the treaty of 1856 (11 Stat. 699, 700) the Creek Indians relinquished to the United States all right or title to any lands theretofore owned or claimed by them, whether east or west of the Mississippi River, "and any and all claims for or on account of any such lands" except those embraced within the boundaries described in the second article of this treaty of 1856.

It was stated in argument that acting upon the amendatory act authorizing the Creek Nation to present its claims in separate suits instead of in one suit, the nation had instituted other suits besides the instant one. They are not now before the court. Our conclusion is that the defendant's demurrer to the petition should be sustained and the petition dismissed. And it is so ordered.

ON DEMURRER TO AMENDED PETITION

Upon demurrer interposed and sustained to the original petition in this cause the petition was dismissed. The court's opinion on the questions raised by the demurrer was announced January 10, 1927. Thereafter a motion was filed asking that the order of dismissal be set aside and the filing of an amended petition be allowed. This motion was granted and an amended petition was filed February 1, 1927. The defendant has demurred to this amended petition and the cause is now before the court upon the demurrer. The questions now presented are not very different from those already considered, and we refer to our opinion on the first hearing. As is there pointed out, the jurisdictional act, Exhibits A and B to the amended petition, confers jurisdiction on the Court of Claims to hear and determine any and all legal and equitable claims "arising under or growing out of any treaty or agreement between the United

Opinion of the Court

States and the Creek Indian Nation or Tribe." The amended petition avers "that this suit is brought upon a claim arising under and growing out of the treaty made between the United States and the Creek Nation on the 7th day of August, 1790." It is averred that by virtue of this treaty the Creek Nation "obtained a vested right to the lands described in said treaty of which the lands taken as hereinafter narrated were a part." Whether Article V of the treaty vests in the Creek Nation title to lands referred to therein we need not determine at this time, because if the averment be treated as one of fact and not merely a conclusion of the pleader it is apparent that what the plaintiff seeks recovery for is a claim that the treaty of the 10th day of July, 1814, a copy of which as Exhibit D is made part of the amended petition, "took from the Creek Nation about 23,000,000 acres of the Creek national domain, which had been guaranteed to the nation by the treaty of August 7, 1790." The amended petition does not vary the effect of the averments in the original petition. The conclusions which the amended petition sets forth are to be accepted only so far as they are borne out by the terms of the treaties to which they refer. The treaty of July 10, 1814, must speak for itself. The claim now asserted is not one "arising under or growing out of any treaty or agreement." The meaning of these terms in the jurisdictional act is shown by the cases cited in our former opinion. The averment that the lands were taken under the power of eminent domain is a mere conclusion. There was a treaty—that of July 10, 1814—which after ratification by Congress became binding on both parties. This court can not amend or set aside that treaty, and until that be done it must be recognized as valid. See *Old Settlers case*, 148 U. S. 427, 469. The effort to do away with the effect of the treaty of the 7th day of August, 1856, and the relinquishment of rights by Article V thereof can not avail, nor by its averments does the plaintiff defeat the agreement of 1889. The jurisdictional act does not create any liability against the United States. It is not an admission of liability. Its office is to furnish a forum in which the claim, if any, may be heard, relieving it from limitations as to time and in some instances

of mere technical defenses. The act is to be read to ascertain what is waived. *Old Settlers case*, 148 U. S. 427, 468; *United States* v. *Choctaw and Chickasaw Nations*, 179 U. S. 494, 535; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 567; *Otoe & Missouria Tribes of Indians*, 52 C. Cls. 424, 429; *Sisseton & Wahpeton Indians*, 58 C. Cls. 302, 329. The jurisdictional act excludes from its provisions "any balance claimed to be due on the so-called Loyal Creek claim." Just what this claim is, or was, does not appear, but for the reasons stated the claim asserted is not one provided for or contemplated by the jurisdictional act. The demurrer to the amended petition should be sustained and the petition dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

CYRUS FRENCH WICKER v. THE UNITED STATES

[No. C-6. Decided April 4, 1927]

On the Proofs

Contract; compliance with request for cancellation.—Where a contract for the furnishing of castor beans provides that upon failure of the contractor to perform the Government may either rescind the contract or grant an extension of time for performance, and the contractor, after the agreed time for performance has elapsed, states that he is unable to fill the contract and requests its cancellation and it is thereupon canceled, there is no breach for which the contractor is entitled to damages.

The Reporter's statement of the case:

Mr. Louis A. Spiess for the plaintiff. *Mr. John Walsh* was on the brief.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. At the time of the transactions hereinafter mentioned plaintiff was a resident of the city of New York, in the

State of New York, and was and now is a citizen of the United States.

II. On March 18, 1918, the plaintiff entered into a written contract with the United States, by its duly authorized contracting officer, Lieutenant O. R. Ewing, A. S., Sig. R. C., numbered 3283, whereby the plaintiff agreed to furnish 1,000 to 5,000 bushels of castor beans suitable for castor oil for Signal Corps purposes, at 9.8 cents per pound, including duty, delivery to be between July 1, 1918, and October 15, 1918, f. o. b. New York City. A copy of the said contract, inclusive of the order which is a part thereof, is attached to the petition as Exhibits A and B and made a part of this finding by reference.

III. In the negotiations preliminary to the execution of the aforesaid contract it was understood between the plaintiff and defendant's said contracting officer that the plaintiff expected to secure the beans called for therein by growing them in Costa Rica or by purchasing them there.

On or about March 19, 1918, the plaintiff left the United States for Costa Rica, arriving on or about April 7, 1918, and immediately began preparations for the planting of castor beans to fill the said contract. Shortly after his arrival in Costa Rica revolutionary disturbances broke out and continued until the middle of the next July. By reason of these disturbances large numbers of laborers were conscripted into the army, and in order to avoid conscription many of them took to the hills. The result of this situation was a shortage of labor, and the planting of castor beans on plaintiff's plantations was thereby delayed to such an extent that it was impossible for him to harvest the beans in time to make any deliveries on or before October 31, 1918, the date of the cancellation hereinafter referred to, and he made no deliveries to the defendant at any time.

IV. Plaintiff left Costa Rica on or about September 1, 1918, and arrived in Washington, D. C., on or about September 16, 1918. He immediately went to the castor bean section of the Air Service, conferred with Capt. Charles Mayer, jr., who was in charge thereof, and Lieut. Denison W. Grant, who was an officer in the said section, apprised them of the situation described and his inability to make

deliveries within the agreed time, and requested of them an extension of time. The said Captain Mayer and Lieutenant Grant were not contracting officers and had no authority to bind or obligate the United States. He had like conferences with the contracting officer, Captain Ewing (formerly lieutenant), and was told by him that an extension of time could be given upon proper proof of interference by the aforesaid revolutionary disturbances. The plaintiff did not submit evidence satisfactory to the said contracting officer of such interference, and an extension of time was not granted.

While these negotiations were in progress plaintiff, on October 29, 1918, sent to the contracting officer, and in due course the contracting officer received, the following letter:

COSMOS CLUB,
Washington, D. C., October 29, 1918.

Lieut. O. R. EWING,
Signal Corps, U. S. A.,
Washington, D. C.

DEAR SIR: In accordance with a recent conversation with Captain Mayer, of the Castor Bean Section of the Bureau of Aircraft Production, I desire to apply for the cancellation or extension of order No. 73042, under contract No. 3283, for the furnishing to the Signal Corps of 2,000 to 5,000 bushels castor beans, at 9.8 cents per pound, delivery to be between July 1 and October 15, 1918.

It has unfortunately proved physically impossible to make deliveries within the short time allowed. I have planted a sufficient acreage to more than fulfill the contract within the next few months, but the planting was not commenced in time to allow for October delivery. The chief reason was revolutionary outbreak in Costa Rica during March and April of this year, which, although with no serious consequences from actual fighting, led to the impressment of thousands of laborers and caused many more to take to the hills to avoid conscription. Ordinary planting could not be started for that reason until late in May and June, too late for harvesting before December.

I have over 1,000 acres under cultivation with castor beans, planted under this contract with the Signal Corps, the first shipments from which can be made in December next. I can fulfill the maximum under the contract before the end of August of next year, up to which time I understand the Signal Corps is now making contracts for delivery of castor

beans. I therefore request that the present contract be canceled and the bond returned, and a new one made to cover such future deliveries, or that the Government will exercise Clause V of the contract, section d, and permit me to complete delivery in accordance with the contract within a reasonable time after October 15. I have also arranged, if a contract can be arranged, to undertake at once new planting, so as to largely increase my production before August 31.

Very truly yours,

(Signed) CYRUS F. WICKER.

V. Upon representation by plaintiff that he desired to have the contract canceled, or its time extended, the contracting officer, the said Ewing, suggested that he secure from the aforesaid Captain Mayer a memorandum directed to the contract department recommending the cancellation of plaintiff's contract, since the castor bean section, of which Captain Mayer was chief, was interested in the fulfillment of the order.

The plaintiff accordingly requested of and secured from Captain Mayer and presented to the contracting officer the following memorandum:

OCTOBER 30, 1918.

Memorandum for Contract Department. (Attention of Captain Ewing)

1. It is suggested that contract with C. F. Wicker, covered by aero order No. 73042, calling for delivery of from 2,000 to 5,000 bushels of castor beans before Oct. 15th, be canceled, as Mr. Wicker called at this office and states that he is unable to fill this contract.

(Signed) CHAS. MAYER, Jr.,
Capt., A. S., A. P.,
Chief, Castor Bean and Oil Sec.

VI. In accordance with plaintiff's request, the contracting officer canceled the contract in suit October 31, 1918, and so informed plaintiff by letter, as follows:

OCTOBER 31, 1918.

To: Mr. Cyrus French Wicker, No. 60 Broadway, New York.

1. Your attention is called to order No. 73042, which is covered by contract No. 3283, providing for the sale to the Government of two thousand to five thousand bushels of

castor beans. The above order contains a provision stating that delivery of the beans covered by this order should be between July 1, 1918, and October 15, 1918.

2. In view of the fact that you have delivered no beans under this contract, you are hereby advised that the same is canceled.

3. This will acknowledge receipt of your letter of October 29, 1918, giving your reasons for failure to fulfill the contract within the time specified.

By direction of the Director of Aircraft Production.

(Signed) O. R. EWING,
Captain, A. S., A. P.

VII. A claim for compensation and damages under the contract in suit was filed with the Secretary of War in the amount of $14,490.00 and was by him rejected, and plaintiff has not been paid the said amount or any part thereof.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

On March 18, 1918, plaintiff, Cyrus French Wicker, entered into a written contract with the Government by the terms of which plaintiff agreed to sell and deliver to the United States from 1,000 to 5,000 bushels of castor beans, for which the Government agreed to pay plaintiff 9.8 cents per pound, including duty, same to be delivered between July 1, 1918, and October 15, 1918. It was understood between plaintiff and the contracting officer for the Government that plaintiff expected to secure the beans called for in the contract in Costa Rica, either by growing or purchasing them. The contract contained the provision that: "If the contractor is prevented from furnishing beans by reason of floods, earthquakes, fires, tornadoes, or other acts of God, or conditions beyond the possible control of the contractor, including revolutions in Costa Rica, he shall be relieved from his obligation to furnish said beans to the extent to which he has been thus prevented from furnishing the same."

After the execution of the contract plaintiff left at once for Costa Rica and there began the preparation of lands and the collection of seed for the purpose of producing

castor beans for the fulfillment of his contract with the Government. It is alleged by plaintiff that by reason of the shortage of labor due to revolutionary disturbances he was delayed in planting at the proper season and was therefore unable to make delivery of any part of the production within the time specified in the contract.

The contract further provided that: "In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the said party of the first part may elect one of the following courses:

"(a) May rescind the contract;

"(b) May supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price;

"(c) May take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the United States of having the articles or equipment completed;

"(d) Or may permit the party of the second part to complete delivery within a reasonable time after the date or dates specified herein and in this event liquidated damages shall be deducted as provided in the attached order."

Plaintiff returned to the United States and came to Washington about the middle of September, 1918, and conferred with certain Government officials connected with the castor bean section of the Air Service concerning his inability to make delivery within the specified time, and requesting an extension of time under the terms of the contract; and plaintiff contends that the time was verbally extended to March 31, 1919, by Captain Mayer and Lieutenant Grant. Negotiations were continued, however, for an extension of time, and on October 29, 1918, plaintiff wrote a letter to the contracting officer, Lieutenant O. R. Ewing, requesting the cancellation or extension of the contract, stating the circumstances which had served to prevent his compliance with same. In this letter it is stated, "I therefore request that the present contract be canceled and the bond returned and

a new one made to cover such future deliveries, or that the Government will exercise Clause V of the contract, section d, and permit me to complete delivery in accordance with the contract within a reasonable time after October 15. I have also arranged, if a contract can be arranged, to undertake at once new planting so as to largely increase my production before August 31." In response thereto on October 31, 1918, Captain Ewing, disregarding the alternative proposals contained in plaintiff's letter, canceled the contract, using the following language: "In view of the fact that you have delivered no beans under this contract you are hereby advised that the same is canceled."

The evidence discloses the fact that neither Captain Mayer nor Lieutenant Grant had authority to extend the time for the completion of the contract. However, in view of the conduct of the plaintiff in continuing negotiations with Captain Ewing on the subject, it is manifest that plaintiff himself did not rely on the alleged extension by those officers. Plaintiff had a number of conferences with Captain Ewing prior to the date of plaintiff's letter requesting a cancellation, in which the subject was fully discussed. Plaintiff was assured that if satisfactory evidence should be presented to the effect that the revolution was the direct occasion of a shortage of labor, which in turn caused the delay in planting, thus preventing the delivery within the specified time, the Government might be authorized to extend the time. In the midst of these negotiations plaintiff wrote the letter of October 29, 1918.

Plaintiff presented a claim to the Secretary of War for compensation and damages in the sum of $14,490, which was rejected, and this action is for the recovery of that amount.

It is the opinion of the court that plaintiff is not entitled to recover. It is therefore adjudged that plaintiff's petition be, and the same is hereby, dismissed.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

HERMAN H. PANAMA v. THE UNITED STATES

[No. C-11. Decided April 4, 1927]

On the Proofs

Contract; sale of Government supplies; warranty; inspection before bidding; damaged condition.—A circular advertising the sale of Government supplies contains the statement that they would be sold "as is," without warranty as to condition, that no allowance on account of its condition would be made after the property was awarded, invites inspection of the goods and says that failure "to inspect any property will not be considered as grounds for any claim or adjustment or rescission of any sale." Before submitting his bid the successful bidder examines a porton of the goods, discovers no damage, and does not insist on a further examination. *Held*, that the purchaser can not recover damages because some of the goods delivered to him were in a damaged condition and of less value than he had anticipated.

Same; waiver of breach.—Where a purchaser, upon discovering that the goods bought are damaged, does not demand a rescission of the sale or offer to return them but asks for an allowance to cover their diminished value, which is refused, and thereafter resells the goods, he has by his conduct waived a breach and is estopped from claiming a rescission.

The Reporter's statement of the case:

Mr. William D. Harris for the plaintiff. *Messrs. Frank Davis, jr.*, and *Robert T. Scott* were on the briefs.

Mr. Joseph Henry Cohen, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Fred K. Dyar* was on the briefs.

The court made special findings of fact, as follows:

I. Plaintiff, Herman H. Panama, is a citizen of the United States and has always borne true allegiance thereto. He is the sole owner of the claim embraced in this suit, and has made no assignment or transfer of said claim or any part thereof or interest therein.

II. On February 2, 1922, the United States, by the Surplus Property Division of the Quartermaster General's Office, issued, published, and distributed its Circular Proposal No.

60, advertising the sale of certain surplus stores of clothing, equipage, and textiles then stored in warehouses at Atlanta, Georgia, and inviting sealed bids to be made thereon. A copy of said Circular Proposal No. 60 marked "Exhibit A," is attached to the petition, and is made a part hereof by reference.

Item #26, in said circular, reads as follows:

> "Towels, huckaback, cotton, 2,601,985 each.
> "Condition: New.
> "Approximate weight, 2 lb. to dozen.
> "Packed 720 to the bale.
> "Sizes: 17×31″.
> 17×34″.
> 17×36″.
> 18×36″."

Said circular contained the statement that all goods would be sold:

" * * * 'As is' and 'where is,' without warranty or guaranty as to the quality, character, condition, size, weight, or kind, or that the same is in condition or fit to be used for the purpose for which it was originally intended, and no claim for any allowances upon any of the grounds aforesaid will be considered after the property is awarded."

The circular proposal provided also:

"Inspection of supplies or material, at point of storage, is invited. Failure on the part of any purchaser to inspect any property will not be considered as grounds for any claim or adjustment or rescission of any sale."

III. A few days prior to March 4, 1922, the day upon which the sealed bids were to be opened, the plaintiff, who had had previous experience in surplus property sales of the Government, went to Atlanta to inspect certain of the goods advertised for sale in the said Circular Proposal No. 60. Upon his arrival at Atlanta, he went to the office of Roy W. Hern, captain, Quartermaster Corps, surplus property control officer, under the command of Colonel Gray Zalinski, where he found samples of the goods advertised for sale arranged on tables. He was there shown samples by Edward D. Leonard, a textile inspector of the Quartermaster Corps, of the huckaback towels offered for sale as item #26. The towels which were displayed as samples,

and several of which the plaintiff at that time purchased, were new, clean, and unspotted. The plaintiff then inquired whether a further inspection of the towels would be permitted, and he was given a pass to the warehouse where the towels were stored. This was a Candler warehouse, originally intended for cotton. It was a one-story building divided into sections. The bales of towels were piled in it, one on top of the other to the ceiling, and back to each wall from the center, the only open space remaining being a narrow passageway through the center. Arriving at the warehouse, he was shown by Mr. Dennis, the warehouseman employed by the United States, and who was subject to the orders of Colonel Zalinski and Capt. Hern, six or eight bales of towels set side by side with the tops cut open so that a view of the interior of the bales could be had, but the towels at the edges could not be seen nor could the condition of the towels in the outside of the bales be seen without removing the towels from the bales. The said towels, before baling, had been arranged in folds of seventy-two towels each and packed so that the edges were on the outside. There were approximately seven hundred and twenty towels in a bale and twenty-five per cent were on the inside, forming a core, and were not contiguous to the wrapping paper, burlap, and hoops. These towels on the inside were clean and new and merchantable in every particular, while those on the outside were damaged by contact with the tar paper and by hoop stains. The method of packing employed by the Government was unusual. The plaintiff was not informed that the towels were wrapped in tar paper, surrounded by burlap, and pressed together with hoops, but he could see in his inspection and examination of the opened bales that the towels were so wrapped and bound. When the plaintiff asked the warehouseman for permission to select several unopened bales at random for inspection, he was told that inspection would be limited to the bales already opened, unless the plaintiff could obtain an order from one of the commanding officers authorizing an inspection of unopened bales. It does not appear that the plaintiff before bidding, or at any time, obtained such an order or endeavored to obtain it.

IV. It does not appear that the towels in the unopened bales were materially different in character from those in the several bales which had been opened for inspection. An examination of the towels in the opened bales would have quickly disclosed the soiled and spotted condition of some of the towels which is complained of by the plaintiff, and there is nothing in the record to show that the plaintiff was in any manner precluded from making any inspection which he might have wanted to make of the towels in the already opened bales. Plaintiff prepared a sealed bid for the sale of the towels to him and filed the said bid.

V. Before the samples aforesaid, which had been exhibited to the plaintiff, had been selected the warehouse had overflowed and a number of lower bales of towels had been damaged by water by reason of the fact that no dunnage had been placed under them. The unsatisfactory condition of alternate dampness and heat in the warehouse caused many of the towels to become mildewed, and others to become spotted from tar and from rust from the wire hoops which held the bales together and others to be soiled from the dust which seeped through the burlap. This condition would not be apparent without an examination of the towels in the bales, and it was not called to the attention of the plaintiff before this bid was submitted, although the warehouseman, who selected the samples and who conducted the plaintiff through the warehouse when he went there for the purpose of making an inspection of the towels before submitting his bid, knew of the condition although he apparently did not know how extensive the damage was. It appears that at the time he made the requisition for the sample towels Captain Hern called for fair samples of the entire lot, but when the warehouseman, Mr. Dennis, made the selection, only clean, merchantable new towels were sent to the sample room, and the unclean, spotted, rust-stained, and mildewed towels were thrown aside and not sent over, and they were not at any time exhibited or shown to bidders.

It does not appear that the officer in charge of the sale knew of the damaged condition of the towels or of the action of Mr. Dennis in making the selection.

Reporter's Statement of the Case

VI. Plaintiff's bid of $0.06751 on 1,000,000 towels and of $0.07151 on the second million towels was accepted by the Government, and he was duly notified of the award. A copy of said letter of acceptance is attached to the petition marked "Exhibit B" and is made a part hereof by reference. The plaintiff left Atlanta to make arrangements to pay for the goods and to sell the same without having actually seen any of the towels except the samples above referred to, together with the towels he had inspected in the bales. Actual possession and inspection of the towels were not given him until he had paid for the same in full.

VII. After the plaintiff was notified that his bid had been accepted he immediately proceeded to Chicago, where he sold a lot of 100,000 towels to a department store at a price of eight cents per towel, f. o. b. Atlanta, and the remainder he contracted to sell to the Gallant Mercantile Corporation. He then returned to Atlanta, paid for the towels, and arranged to store them in another Government warehouse, giving a receipt at the time of payment for "Class A, new towels; huckaback." Class A meant, according to surplus property regulations, material that had never been used and was in good condition. After giving said receipt and accepting delivery, plaintiff began to remove said towels in the presence of Mr. Gallant and Mr. Dennis, the warehouseman employed by the United States, and inspection was made of about fifty bales. It was found that in all the bales examined the towels which were next to the wrapping paper were quite uniformly damaged by tar stains, hoop stains, dust, and rust. A number of them were rotted and mildewed, owing to their having been subjected to the overflow of water in the warehouse. As a result Mr. Gallant, for the Gallant Mercantile Corporation, canceled his contract with the plaintiff. The plaintiff immediately protested the condition of said towels and put in a claim for a refund of part of the purchase price, which was denied, but he did not demand a rescission of the sale or offer to return the towels, but proceeded to sell them. Upon delivery of the towels in Chicago the department store found them to be damaged and deducted two hundred and sixty-five dollars from the agreed purchase price. The plaintiff made a second claim for re-

Opinion of the Court

fund of part of the purchase price, but the local board denied said claim, and the claim was finally rejected by the Secretary of War. The plaintiff subsequently sold 1,372,000 of the towels for $0.07 and 500,000 for $0.0725.

VIII. Plaintiff has conceded that twenty-five per cent of all the towels were in perfect condition, and it has been estimated, although seemingly no attempt for an actual count was made, that the remainder, or seventy-five per cent, of the towels was damaged either by water, resulting in rot and mildew, or stained by contact with paper impregnated with tar or some similar substance, or were soiled with rust stains from the hoops, or from dust.

It appears from the testimony that on March 4, 1922, the day on which the plaintiff bought the towels, the wholesale mill price of new towels, similar to those which the plaintiff had been shown by Captain Hern, was from ninety-five cents to one dollar per dozen, if bought in small quantities, and approximately ten per cent less than that if purchased in larger quantities, and that on account of the condition which they were in, the towels which were delivered to the plaintiff were worth from but thirty-five cents to forty cents per dozen. Plaintiff, however, sold the towels at a small profit.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a suit in which the plaintiff seeks to recover losses sustained in the purchase of material from the defendant upon the ground of a breach of an alleged warranty of the material.

The defendant in a circular dated February 2, 1922, advertised for sale certain materials, among which were "Towels, huckaback, cotton, 2,601,985 each; condition new." The conditions of sale contained in the circular are the same as those in the case of *Triad Corporation* v. *United States*, decided by this court February 14, 1927, *ante*, p. 151. The proposal stated that the material was sold "as is" and "where is," without "warranty or guaranty as to the quality, character, condition, size, weight, or kind," or that the material "is in condition to be used for the purposes for which it was originally intended, and no claim for any allowances upon any of the grounds aforesaid will be considered after the prop-

erty is awarded." It also contained a provision to the effect that "Failure on the part of any purchaser to inspect any property will not be considered as grounds for any claim or adjustment or rescission of any sale."

As was stated by the court in the *Triad case*, *supra*, it is difficult to see how the Government could have given prospective bidders fuller notice than it gave—that it was only selling what it had in the condition in which it was. Opportunity for inspection was afforded plaintiff, and it is clear that if he bid without inspection or after inspection he was bound by his bid.

It was known that the Government was not in the business of manufacturing and selling material, and the letter of acceptance stated that "Sales are made under this agreement in good faith and from reported verifications of surplus stock."

The towels which the plaintiff purchased were stored in bales in the warehouse. A number of bales were opened for inspection, and the plaintiff was given an opportunity to examine them as thoroughly as he desired, and he did examine them. It is true that he demanded the privilege of examining other bales so that he might have what he called a "hundred per cent inspection," which was refused by the warehouseman, with the statement that he would have to get an order from the officer in charge before this could be done. It does not appear that plaintiff asked for such an order, but afterwards put in his bid for the material. He paid the amount of his bid and the goods were transferred to his possession and to another warehouse. After delivery it transpired that a portion of the goods was damaged, partly by reason of heat operating on the tar paper in which the goods were wrapped and partly by dampness of the floor of the Government warehouse. The goods had been in the possession of the Government almost four years.

There is some evidence that the warehouseman and the subordinate officer who made the selection of samples knew of the damaged condition of the towels. This was not a sale by sample under the terms of the proposal; it was a sale of a quantity of towels without guaranty or warranty as to their quality, character, condition, or kind, or that they

were fit to be used for the purposes for which they were originally intended, and it was stated that no claim for allowances upon any of the grounds aforesaid would be considered after the property was awarded.

It does not appear that the authorized official having charge of the sale knew of the damaged condition of the towels. In any event, under the terms of the proposal the officer making the sale had no authority to enter into any warranty as to the condition of the material or vary the terms of the proposal. The case of *Triad Corporation*, *supra*, and authorities cited therein are controlling against plaintiff's right to recover.

But there is another phase of the case. The plaintiff, after discovering that the goods were damaged, did not demand a rescission of the sale or offer to return the towels, but asked for an allowance on account of diminished value due to their damaged condition. After this was refused he sold the goods. He thus waived the alleged breach. By disposing of the material and putting himself in a position where he was not able to return it he is estopped from claiming, assuming he had a right to claim, a rescission of the contract. *Veazie* v. *Williams*, 8 How. 134, 158; *Andrews* v. *Hensler*, 6 Wall. 254, 258; and *Neblett* v. *MacFarland*, 92 U. S. 101, 103.

The petition should be dismissed, and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

CENTRAL CONSTRUCTION CORP. v. THE UNITED STATES

[No. B-223. Decided April 4, 1927]

On the Proofs

Cost-plus contract; termination of subcontract; settlement with subcontractor; attorneys' fees as part of cost.—At the request of a contracting officer a Government contractor lets out a portion of its work to a subcontractor. The work of the subcontractor proves unsatisfactory to the contracting officer and he requests the contractor to take it over and make a settlement with the subcontractor. For this purpose the contractor, without first

Reporter's Statement of the Case

obtaining the approval of the contracting officer, employs a firm of attorneys who in the settlement effect a saving which is of material benefit to the Government. Payment of the attorneys' fees is afterwards approved by the contracting officer as a part of the cost of the work, but is disallowed by the accounting officer. *Held*, that the attorneys' fees so paid and approved are a part of the cost for which the contractor is entitled to reimbursement, that the action of the contracting officer was conclusive and the accounting officer without authority to refuse allowance.

Same; expense of defending suit for false arrest.—Where a Government contractor employs a firm of attorneys to defend a suit brought against it for an alleged false arrest made at the instance of agents of the Department of Justice, the attorneys' fees are not a part of the cost of the contract work, notwithstanding the contracting officer approves their payment as such.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Mr. George A. King* and *King & King* were on the brief.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Frank J. Keating* was on the brief.

The court made special findings of fact, as follows:

I. The Central Construction Corporation, plaintiff herein, was organized under the laws of the State of Pennsylvania, with its principal office and place of business in Harrisburg.

II. On November 23, 1917, the plaintiff entered into a formal contract with the United States, represented by Jay E. Hoffer, colonel, Ordnance Department, United States Army, as contracting officer for the erection of a gas-shell filling station at Gunpowder Neck, Md., although the actual work of construction had been commenced some weeks prior to that date. The contract provided, among other things, that the contractor should receive its costs of construction plus a profit of 10 per cent on all such costs (except cost of premium on bond), all as allowed and determined by the contracting officer. A copy of the contract is attached to plaintiff's petition herein, marked "Exhibit A," and is by reference made a part of this finding. The said contract was by supplemental agreement dated July 2, 1918, modified so

that the total fee to the contractor in no event should exceed the sum of $250,000.

III. On November 13, 1917, the plaintiff, at the request and with the approval of Edwin M. Chance, captain, Ordnance Department, in charge of the design, construction, and operation of the gas-shell filling station at Gunpowder Neck, Md., employed the Dorsey-Miller Co., of Baltimore, Md., as a subcontractor for the construction of a dock or pier for the United States on the Bush River at the reservation. The work was to be done under United States Ordnance Department regulations as to cost, and the Dorsey-Miller Co. was to receive a fee of 10 per cent on the actual cost of construction. After the work undertaken by the Dorsey-Miller Co. was more than one-half completed Captain Chance became dissatisfied with the methods of operation and the progress being made by the Dorsey-Miller Co. He requested the plaintiff to take over the plant and equipment of the Dorsey-Miller Co. and to make a settlement with them for the work which they had already completed, and for the materials which they had on hand, and to then complete the work on its own account.

IV. In its negotiations for a final settlement the Dorsey-Miller Co. made certain demands for work which it had completed and for materials which it had furnished, which demands the plaintiff and the Government auditor considered excessive. The plaintiff thereupon, but without first having obtained the authority and approval of the contracting officer, engaged the law firm of Willis & Willis, of Baltimore, Md., to continue negotiations with the Dorsey-Miller Co. As a result of the efforts of counsel, the Dorsey-Miller Co. agreed to accept in full settlement of its claim a sum approximately $8,000 less than it had at first demanded. Payment was made by the United States to the Dorsey-Miller Co. of the amount that had been agreed upon in settlement and a complete release was obtained from the Dorsey-Miller Co.

V. Messrs. Willis & Willis charged the plaintiff the sum of $1,000 for their services in effecting the Dorsey-Miller Co. settlement. Their bill was paid by the plaintiff, and on March 15, 1919, a public voucher for payments on contract was prepared, which was certified as correct by the plaintiff

Reporter's Statement of the Case

and by the accountant in charge and by the audit clerk cost-accounting branch of the Government, and was approved for payment by the officer in charge cost accounting branch, and by the contracting officer in charge of the work. The disbursing officer of the United States, however, refused to make payment, and sent the voucher to the Auditor for the War Department, where the claim was disallowed. The plaintiff has not been reimbursed for the amount paid by it to counsel, Messrs. Willis & Willis.

VI. The construction of the gas-shell filling plant was of an urgent character and was incident to a great deal of other emergency war work going on at the reservation in which other contractors were engaged. The several contractors who were engaged in construction there were often in competition with each other for laborers, and an objectionable practice grew up of laborers who had agreed to work for one contractor being persuaded on arrival at the reservation to enter the employ of one of the other contractors. One of the men who was active in promoting this practice was named West. The Government desired to put a stop to this practice. Officers acting under the direction of the United States Department of Justice were sent to the reservation, and on one occasion, finding West intoxicated at the railroad station, had him arrested on the charge of drunkenness and disorderly conduct, but he was subsequently released. Thereafter he sued the Central Construction Co. for $10,000 for alleged false arrest. The plaintiff again and without having obtained the authority and approval of the contracting officer employed Messrs. Willis & Willis, of Baltimore, this time to defend it in the defense of this suit, which suit on trial was dismissed. Messrs. Willis & Willis made a charge of $500 for their services and incurred necessary expenses amounting to $2.65. Their bill was paid by the plaintiff, and on May 2, 1919, public voucher for payment by contractor was approved and certified correct by the plaintiff and by the accountant in charge, and by the audit clerk, cost accounting branch of the United States, and was approved for payment by the officer in charge, cost accounting branch, and by the contracting officer in charge of the

work. The disbursing officer declined to make payment on presentation of the voucher and sent it to the Auditor for the War Department for settlement, who disallowed the claim. The plaintiff had not been reimbursed for the amount of the costs incurred and paid by it.

The court decided that plaintiff was entitled to recover, in part.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover from the United States the sum of $1,502.65. Two items make up this sum. The first item is the sum of $1,000 paid by the plaintiff to Willis & Willis, attorneys of Baltimore.

This item of the claim is founded on a contract made November 23, 1917, between the plaintiff and the United States for the construction of a gas-shell filling station at Gunpowder Neck, Md. The contract was on a cost-plus basis. The contract provided for the payment of the actual cost of "all materials actually used, of all laborers necessarily employed, of outside superintendent, of all drayage, freight, and express charges, of premium on bond when required, and of all other necessary costs which may be approved in writing by the contracting officer or his duly accredited representative, and the United States will also pay to the contractor as a profit a sum equal to 10 per cent on all such costs (except cost of premium on bond) all as allowed and determined by the contracting officer."

The term "contracting officer" was defined in the contract as follows: "Wherever the term contracting officer is used in this contract the same shall be construed to mean his successor or successors, his duly authorized agents or representatives, or any person designated by the Chief of Ordnance, from time to time, to act as contracting officer." During the time here involved Capt. Edwin M. Chance was the duly authorized agent of the contracting officer.

On November 13, 1917, the plaintiff, at the request of the defendant, employed the Dorsey-Miller Co. as a subcontractor for the construction of a dock for the United States on the Bush River at the reservation. The work was to be

Opinion of the Court

done under United States Ordnance Bureau regulations as to costs, and the Dorsey-Miller Co. was to receive a fee of 10 per cent on the actual cost of construction. After the work undertaken by the Dorsey-Miller Co. was more than one-half completed the contracting officer, Captain Chance, became dissatisfied with the methods of operation and the progress being made by the Dorsey-Miller Co. He requested the plaintiff to take over the plant and equipment of the Dorsey-Miller Co. and to make a settlement with them for the work which they had already done, and for the materials which they had on hand, and to then complete the work on its own account.

In its negotiations for a final settlement the Dorsey-Miller Co. made certain demands for work which it had completed and for materials which it had furnished, which demands the plaintiff and the Government auditor considered excessive. Legal questions were involved, and suit was threatened by the Dorsey-Miller Co. The plaintiff thereupon engaged the law firm of Willis & Willis to take up the negotiations with the Dorsey-Miller Co. As a result of the efforts of Willis & Willis the Dorsey-Miller Co. agreed to accept in full settlement of its claim $8,000 less than it had first demanded. Payment was made by the United States to Dorsey-Miller Co. of the amount so agreed upon, and as a result of the action of the plaintiff in securing the services of Willis & Willis the United States was saved the sum of $8,000.

Willis & Willis charged the sum of $1,000 for their services. This sum the plaintiff paid to them on March 15, 1919. A voucher for the payment of the said sum of money was approved by the contracting officer. The disbursing officer of the United States refused to make payment and his action was upheld by the Auditor for the War Department. The plaintiff has not been reimbursed for the amount so paid by it.

The only question for our consideration is whether or not the payment of the $1,000 to Willis & Willis is a part of the cost of the work contemplated by the contract. If it can be said to be a part of the cost of the work, then the

payment having been approved by the contracting officer was a payment for which the plaintiff is entitled to be reimbursed.

Ordinarily we would not hold that fees to counsel were necessarily a part of the cost of the work contemplated in contracts of this character. But in this case the plaintiff was requested by the contracting officer to perform certain services for the benefit of the Government, and in the course of the work under the contract these services could not be properly performed in the interest of the Government without the employment of agencies equipped for their effective performance. The plaintiff had to employ such agencies and was, in effect, authorized to do so, and having employed them and paid them their reasonable charges, the plaintiff should be reimbursed the amount so paid, especially in view of the fact that the Government, and not the plaintiff, benefited. We think that any cost which was incurred as a result of the settlement made by the plaintiff at the request of the Government with the Dorsey-Miller Co. is a part of the cost of the work contemplated by the contract and that the contracting officer was acting within the scope of his authority when he approved the payment of $1,000 to Willis & Willis. His decision and action in the matter were conclusive, and it was beyond the power of the Auditor for the War Department to refuse payment. *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; and *Mason & Hanger Co.* v. *United States*, 56 C. Cls. 238.

The second item of the plaintiff's claim is for the sum of $502.65, paid by it to Willis & Willis for defending a suit brought against it by one West for alleged false arrest. The arrest was made by officers of the United States and the plaintiff was in no wise connected with it. It was the plaintiff's misfortune if it was singled out from other contractors on the reservation and made defendant in such a suit. But it was not a part of the cost of the work contemplated by the contract. It is true that the contracting officer approved the payment of this item, but when he did so he was clearly acting outside of the scope of his authority, and his action can not be ratified.

Judgment will be entered for the plaintiff in the sum of $1,000. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. THE UNITED STATES

[No. B-71. Decided April 4, 1927]

On the Proofs

Salvage services; basis of compensation.—The factors to be considered in determining an award for salvage services are: (1) The value of the vessel and cargo salved; (2) the perils and dangers of her situation when accepting service; (3) the dangers incident to the performance of the service by the salvor; (4) the value of the salvor's outfit; (5) the actual expense incurred by the salvor; and (6) all other pertinent facts and circumstances connected with and incident to the situation involved; and (7) in addition thereto a sum over and above expense and profit sufficient to encourage salvage service.

The Reporter's statement of the case:

Mr. John W. Griffin for the plaintiff. *Mr. L. Russell Alden* and *Haight, Smith, Griffin & Deming* were on the briefs.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. W. Clifton Stone* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and existing under the laws of the State of West Virginia, and has its principal place for the transaction of business in the city, county, and State of New York.

II. It has at all times hereinafter mentioned and for many years prior thereto maintained a large fleet of derricks, steamers, tenders, and other apparatus used and

equipped for the purpose of recovering and salvaging vessels, and at all of said times maintained and operated said fleet, with its equipment, for the purpose of salvaging vessels in the waters of the Atlantic Ocean and the waters along and adjacent to the Atlantic coast of the United States and tributary waters, and has maintained various wrecking stations fully equipped for rendering salvage service at short notice, among which stations there is one located at the city of New York and another at Norfolk, Va. In general, its work was divided into two classifications—offshore and harbor. Its offshore department represented an investment of about one million and a half dollars.

III. The facts stated in this paragraph have been stipulated by the parties through their respective counsel to be as follows:

"At the time of the rendition of the services in respect to which this suit is brought the *Graf Waldersee* was an ex-German vessel in the possession of and being operated by the United States of America under the following circumstances:

"The *Graf Waldersee*, under international arrangements between the allied and associated powers on the one hand and Germany on the other hand, to which arrangements the United States of America was a party, had been taken over by the allied and associated powers for the purpose of repatriating troops and of furnishing food supplies to Germany. Subsequently the allied and associated powers, including the United States of America, had agreed that the *Graf Waldersee* should be temporarily assigned to the United States of America for the purpose of supplying and repatriating American troops in France. Under the foregoing arrangements, while the *Graf Waldersee* was in the possession of the United States of America, and at the time said services were rendered, the vessel was at the risk of the United States of America, in respect to marine loss thereof or damage thereto, and the United States of America was responsible for the settlement of any claims arising out of salvage services rendered to the vessel. At the time of the rendition of said services the *Graf Waldersee* was engaged in transport service for the United States Army, under the direction of the War Department, and manned by officers and crew of the United States Navy, under the direction of the Navy Department of the United States."

IV. The *Graf Waldersee*, built in Hamburg in 1898, was a steel twin-screw steamship 561.2 feet long between perpendiculars, by 62.2 feet beam, by 37.7 feet depth, with quadruple expansion engines. Her gross tonnage was 13,193 and her net tonnage 8,375. Her value was $1,500,000. She had 9 holds, of which 5 were forward of the fireroom and engine space and 4 were aft of the fireroom and engine space. These holds were known as Nos. 1 to 9, respectively, counting from forward aft.

Prior to the voyage hereinafter referred to, the *Graf Waldersee* had been refitted as a troopship and accommodations for troops had been installed, among other places, in Nos. 6, 7, 8, and 9 holds and on the various decks above these holds.

Abaft of the engine room and under No. 6 hold was a recess in which various auxiliary engines, etc., were placed. This recess was in the center of the ship, but it did not extend completely out to the sides of the ship.

The ship had bulkheads between her holds which extended to the upper, or ober, deck. These were originally watertight, but had been cut through to a considerable extent in refitting the vessel, so that they were no longer so.

The *Graf Waldersee* had six decks, of which the uppermost was known as the sturm, weather, or shelter deck, and the deck below that was known as the upper or ober deck.

Running aft from the engine room, a little above the bottom of the ship, were two shaft tunnels, or alleys, containing the propeller shafts. Each of these shaft alleys measured about 4 to 5 feet in width by 7 feet in height, and ran from the engine room back to the stern of the ship. As part of the vessel's permanent equipment there were ventilators or escapes, which ran from each of the two shaft alleys up through No. 6 hold and No. 7 hold. There were two such ventilators in each of these holds. In these ventilators, in connection with the fitting of the steamship as a troopship, had been cut passageways about 13 by 13 inches in size, opening out to the various decks. There were also similar shaftways or ventilators running from the shaft alley up through No. 9 hold, with similar openings to the ober or upper deck.

V. On the 11th day of June, 1919, the said *Graf Waldersee*, being then engaged in Army Transport Service, was en route to Brest, France, from New York. She carried a crew of about 550 men and 40 officers and had 10 passengers aboard. She also had on board about 3,200 tons of coal, together with about 1,500 tons of provisions for consumption on the voyage which she was making to France and on the return voyage on which she was to bring back troops. The said coal and provisions were the property of the United States.

The coal was stored in part in the ship's bunkers and in part in No. 5 hold, which was just forward of the fireroom. There were openings for passage between the fireroom and said No. 5 hold.

When about 25 miles from Ambrose Lightship, and in latitude 42° 17′ north and longitude 73° 18′ west, she was struck by the steamer *Rodondo* on her port side about 350 feet from the bow. This collision occurred at 10.59 o'clock p. m. of that day. The point of impact was at the longitudinal coal bunkers alongside of the fireroom. The fireroom began immediately to fill with water and at 11.02 p. m. the ship began to send out S O S calls. The ship's boats to the number of about 10 were lowered, and the passengers and all members of the crew who would be unserviceable in such an emergency were lined up in readiness to go to the boats.

The workmen immediately began to attempt temporary repairs by covering the damaged area with collision mats and tarpaulin and stuffing the holes with blankets, mattresses, hammocks, etc.

The steamer *Patricia*, which was a sister ship of the *Graf Waldersee*, received a wireless call for assistance from the latter boat at 11.52 p. m. This call stated that the *Graf Waldersee* had been rammed and was sinking. The *Patricia* immediately went to the assistance of the injured vessel, and at 12.43 o'clock the following morning she was sighted. When the *Patricia* came alongside approximately 100 of the crew, together with the passengers of the *Graf Waldersee*, were in the boats, and at 1.03 o'clock the *Patricia* took aboard the occupants of these boats.

By the time the *Patricia* arrived the fires had been affected by the presence of the water in the engine room, with the result that the steam pressure had been reduced to such a point that the foghorn was barely audible at 500 yards, her winches had no power, and her lights were out. The main source of power for radio transmission was also unavailable, but emergency power was available and in working order.

At about 2.30 a. m. water began to come into No. 6 hold from the shaft alley tunnels and through some tap holes in the bulkheads. An attempt was made by the *Graf Waldersee's* crew to stop this leakage. At about 3.30 a. m. water began to come into hold No. 6 in substantial quantities through the shaft alleys and ventilator shafts referred to above, whereupon the working party of the crew, which had been in hold No. 6, was removed from that hold. At the same time water started to enter No. 7 hold by the same means.

Communications were exchanged between the commanders of the two ships, decision was made to tow the damaged vessel to the nearest beach, and at 3.20 a. m. two 8-inch hawsers were secured and towage started. Speed was gradually increased to approximately 7 knots. This towage was continuous until beached, except for a stop to transfer the *Graf Waldersee* boats from the starboard side to the port side of the *Patricia* to save them from damage. This stop was made at 5.35 a. m. and towage again started at 6.20. About 7 o'clock the same morning the tugs *Holtex* and *Margaret Sanford* arrived, took a line to the *Graf Waldersee* and assisted in towing.

One of the calls for assistance reached the plaintiff's representative at about 2 o'clock of the morning of June 12. This request for assistance came through the office of the commandant of the third naval district of New York. The steamer *Resolute* being ready for immediate salvaging work was notified and left with its gear from Stapleton, Staten Island, at 3 o'clock a. m. It was fully equipped with men and wrecking material. The *Resolute* arrived along the side of the *Graf Waldersee* at 7.20 a. m. and found her still in the tow of the steamer *Patricia* and tugs proceeding slowly to-

ward Long Island. At that time her position was 22 miles southeast of Ambrose Lightship sounding 16 fathoms of water. At the time the engine room was full of water; No. 5 hold had 18 feet of water; No. 6 hold, 15 feet; and No. 7 hold, 13 feet.

The *Resolute* attached herself to the port quarter and placed a 6-inch chain drive pump in No. 7 hold, connected it, and started to pump at 8.20 a. m. She furnished steam and assisted in towing and later placed a 6-inch duplex pump in No. 7 hold and began pumping with the latter at 9.30 a. m. These two pumps had a capacity of 700 to 750 gallons per minute. The wrecking crew had meanwhile attempted to shut off the leaks in the ventilators and lower decks of Nos. 6 and 7 holds, but were not able to stem the rapidly rising water. These leaks came from four ventilators and were caused by the pressure of water in the engine room. At 9.30 a. m. the personal effects of the crew of the *Graf Waldersee* were placed on the tug *Resolute*. At 10.20 a. m. the plaintiff engaged the tug *Juno* to assist in towing the steamer.

After being towed about 22½ miles the *Graf Waldersee* was beached at 10.45 a. m. about 2 miles from the south shore of Long Island, near Long Beach, and in about 6½ fathoms forward and 7 fathoms aft. Her head was toward the beach, and she was resting on a sand bottom. The *Patricia*, because of the danger of herself being beached, was not able to carry her clear to the beach and cast off her line at 10.23. The momentum of the ship, together with the assistance of the tugs, brought the *Graf Waldersee* to her resting place. She dropped a bow anchor, and the tug *Juno* carried out her stern anchor and also brought back the members of the crew who had been taken aboard the *Patricia*. At 1.50 p. m. the *Patricia* continued her voyage.

At the time of the collision the *Graf Waldersee* drew about 26 feet forward and 29 feet aft and had about 15 feet freeboard aft (i. e., the distance from the water surface to the weather deck). By about 1 a. m. she had settled by the stern so as to reduce her freeboard to about 11 feet, at 7.30 a. m. to about 8 feet, and by the time she was beached to about 6 feet. At 4 a. m. she had listed about 1° starboard, at 8 a. m.

2°, and at 12 noon 6°. During her towage she rolled, but generally behaved well.

The *Resolute* and those on board her, before the *Graf Waldersee* was beached, had pumped out about 525 tons of water from No. 7 hold and checked the inflow of water in both No. 6 and No. 7 hold by tying mattresses around the openings in the ventilators so as to stop, or nearly stop, the leakage. Thus they removed 525 tons of water and, in addition, prevented the entrance of an indeterminable amount of additional water. If No. 6 and No. 7 hold had contained 525 additional tons of water the water line outside the ship aft would have been above the ober or upper deck from the stern forward to a point about the middle of No. 7 hatch. In that event there would have been grave danger that the ship would have sunk before she was beached.

At the time of beaching holds 1, 2, 3, and 4 were dry and No. 5 was full to sea level; the engine and boiler rooms were full to sea level; Nos. 6 and 7 sea level, 8 dry, and 9 about 14 feet of water. These holds were separated by bulkheads, which were water-tight, but in this instance the water had gotten through the doors from one compartment into another before they could be closed, and also through the ventilators which had been cut through in converting it into a troopship.

At about 7 or 8 o'clock in the morning of the 12th plaintiff received a call from its representative at the wreck announcing that more assistance was required, and the plaintiff thereupon proceeded to equip and make ready other boats of its fleet. The wrecking Barge *Chittenden* was made ready and was towed to the scene of the wreck by its steamer *Chapman Brothers*. These two boats arrived at about 7 p. m. of the 12th. The *Relief* arrived at 11 o'clock the same evening, and the steamer *Rescue*, from Norfolk, arrived on the scene early on the morning of the 14th. The *Relief* brought with her plaintiff's own superintendent of salvage, who immediately took charge of all the operations.

Divers had accompanied the *Chapman Brothers* and the *Chittenden* and immediately proceeded to work on the area of collision. They found that a collision mat had been used temporarily to cover the holes in the side, but that the action

of the water had rolled this partially away, exposing the break. Some two hours were spent in cutting this mat away. The break was abreast of the engine room, or the thwartship coal bunker. The ship was dented in for an area of about 12 to 16 feet and about 3 to 4 feet deep. The tie plates had been torn off and several open holes made. Two of these holes were about 18 inches square and one about 4 feet square.

At this time 1, 2, 3, and 4 holds were still dry; No. 5 at sea level; the engine and boiler rooms were sea level; No. 6 was a little below sea level; No. 7 considerably below sea level; No. 8 nearly dry; and No. 9 a small amount of water.

The divers worked till about 2 o'clock of the morning of the 13th, and went to work again at 7 o'clock a. m., continuing until about 10 o'clock on the morning of the 14th. An attempt was first made to patch the breaks with wooden patches made of 2-inch plank padded with 6-inch canvas bored through for threaded bolts. Carpenters were put to work on these patches according to dimensions and divers proceeded to attempt to place them. These divers were lowered under water at the side of the ship by means of a stage loaded with chains down by lines from the side of the ship. A heavy ground swell, however, was running and this caused the stage to swing fore and aft 6 to 7 feet each way from center. This swinging would have made it practically impossible for the divers to fasten the patches in this manner under three days' time. In the afternoon of the 13th, it becoming apparent that the vessel was sinking rapidly in the sand, a more expeditious, although more temporary, repair became necessary. Thereupon the holes were plugged with mattresses, blankets, and oakum. This plugging was accomplished by running a line through the hole on the inside of the ship to the diver on the outside, who would thereupon tie the mattress and blanket to the line, and the same would be pulled up against the ship by the workmen on the inside. This arrangement served as a valve, so that when a wave receded and water pressed against the mattress from the inside of the ship, such water could flow out; but when the next wave come it pressed the mattress back against the side of the ship, so that no more water could enter.

Reporter's Statement of the Case

VI. During the 13th additional pumps and boilers were placed on the *Graf Waldersee*. In all, 17 pumps were installed with a combined capacity of 4,245 tons per hour. Pumping was continuous and the divers continued their work in plugging up the breaks in the side till about 11 p. m. that evening, and also with the assistance of the steamer's crew plaintiff's men were likewise engaged in stopping up toilets and scuppers. The purpose of this was to prevent the flooding of the ober or upper deck through these openings, which, if not plugged, would have allowed water to flow in large quantities from the sea onto that deck as soon as the water had risen to such height, and thence would have flowed down all hatches into the various holds and compartments. The water in No. 5 hold, the engine room and fire room, and Nos. 6 and 7 holds had been lowered somewhat.

On the 14th pumping was still being continued and divers continued making repairs to the breaks in the side. At 9.45 a. m. of that day the *Rescue* placed a towline on the bow of the *Graf Waldersee* and the Government tug *Fulton* attached itself ahead of the *Rescue*, and pulling started at 10 a. m., the *Chapman Brothers*, *Relief*, and *Resolute* assisting. At 11.50 a. m. the steamer's bow was swung offshore slowly. At 1 p. m. she was headed southeast. Pumping was still continued, the water was getting lower, and at 3.15 p. m. she floated.

One Government tug took the barge *Chittenden* back to New York while the remaining vessels of the plaintiff, assisted by several Government tugs, towed the *Graf Waldersee* into New York Harbor, a distance of about 20 miles, arriving off quarantine (New York City) at 8.50 p. m., at which time the tug *Resolute* let go her hawser. The *Rescue*, *Relief*, and *Chapman Brothers*, assisted by the Government tugs, anchored the steamer off Bay Ridge at 9.30 p. m. The *Rescue* left about 10.45 p. m. for Norfolk, arriving at 5.30 a. m. the 16th. The steamers *Relief*, *Resolute*, and *Chapman Brothers* stood by the *Graf Waldersee*, furnishing her with steam and electric lights.

During the entire time of towage, and for two or three days thereafter, the plaintiff was operating its pumps to keep

down the water in the ship. The plaintiff's superintendents, wreckers, divers, etc., also kept watch on the patches, on the mattresses, and other material which had been inserted in the holes, replacing it as required.

On the 15th divers were at work putting on wooden patches in place of the temporary plugs, and the barge *Chittenden* and the steamer *Chapman Brothers* removed the gear forward and the *Relief* removed the gear aft. A 6-inch duplex pump was still worked at intervals in the holds, and the pump was also working continuously in the engine room. The *Resolute* left the *Graf Waldersee* at 2.50 p. m. this date.

Similar work was done on the 16th, on which date, at 11.20 a. m., the steamer *Relief* left the *Graf Waldersee* for Stapleton, Staten Island. At 4.40 p. m. the *Chapman Brothers*, assisted by Government tugs, took the *Graf Waldersee* to Fifty-eighth Street, Brooklyn, N. Y.. At 5.50 the *Chapman Brothers* still continued to furnish steam and electric lights, and a workman was on watch with the pumps.

On the 17th the *Chapman Brothers* continued removing wrecking material and the barge *Chittenden* was engaged in loading supplies at the end of the pier. Divers were still engaged in keeping watch over the condition of the patches. The *Chapman Brothers* and the barge left the *Graf Waldersee* at 2 p. m., arriving at Stapleton, Staten Island, at 2.40, immediately starting to discharge their wrecking material, and finished same at 6 p. m.

On the 18th and 19th a diver and diving boat was maintained at the side of the *Graf Waldersee* for the purpose of protecting the patches against the possibility of damage. She was placed on dry dock on the afternoon of the 19th.

VII. The plaintiff, through its officials, was in sole charge of the work of salvaging the *Graf Waldersee*. The measures adopted were decided upon and carried out by the plaintiff and its men. Some assistance was also rendered by the crew of the *Graf Waldersee* when requested by the plaintiff's representatives.

VIII. The *Relief* was 184 feet in length, 30 feet beam, 20 feet deep, 1,600 to 1,800 indicated horsepower, and built of steel with a double bottom. Her gross tonnage was 828 and net 563, and her value was $300,000.

Reporter's Statement of the Case

The *Rescue* was 165 feet in length, 34 feet beam, and 17 feet deep. She was a wooden vessel of 1,300 horsepower, and her value was $90,000.

The *Resolute* was 142 feet in length, 30 feet beam, and 17 feet deep, and had a gross tonnage of 453 and a net tonnage of 219. She was built of steel with part single and part double bottom and of 1,000 horsepower. Her value was $210,000.

The *Chapman Brothers* was 135 feet in length, 35 feet beam, and 12 feet deep, and was a steel steamer of 900 horsepower with 472 gross and 321 net tonnage. Her value was $195,000.

The barge *Chittenden* was 128 feet in length, 27 feet beam, 8.7 feet deep. She was made of wood and contained two derricks, one capable of 5 tons and the other 10 tons capacity, and also contained hoister and boiler for operating. Her gross tonnage was 235 and net tonnage 186, and her value was $12,500.

Two other boats used by the plaintiff in its salvage operations on the *Graf Waldersee* were modern ones, were called the *Chaser* and *Cruiser*, and were valued at $33,000 and $5,800, respectively. These two were small wooden boats used for dispatch and carrying gear. The *Chaser* was built in 1918 and had an 80-horsepower gas engine and was fitted with a mast and boom. The *Cruiser* was 40 feet long and was built in 1917.

In the year 1918 the *Relief*, the *Rescue*, the *Resolute*, and the *Chittenden*, together with a large amount of salvage and wrecking gear owned by the plaintiff, were taken over by the United States Navy for use in connection with the war. On May 15, 1919, said vessels, together with a large amount of wrecking gear, were returned by the Government to the plaintiff under an agreement dated May 9, 1919, between the plaintiff and the Government whereby the United States sold and delivered to the plaintiff and the plaintiff purchased from the United States the said vessels and the said salvage and wrecking gear, together with some other gear which had been acquired by the Navy from other sources, and whereby provisions were made for the determination of the sum to be paid by the Government for the

taking over of the said vessels and other property and the sum to be paid by the plaintiff for their repurchase, together with some salvage gear which had been acquired by the Navy from other sources.

At the time of the salvage operations herein referred to title to and possession of said vessels and other property were in the plaintiff pursuant to said agreement, and were being used and operated by it at its own expense in the conduct of its business, and at its own risk in regard to loss or damage, subject only to the immediate reversion of title to and the vesting of title in the United States and the transfer of possession to the Navy Department within 60 days after the failure of the parties to agree on the purchase price, or after the failure of the plaintiff to adjust accounts in the manner provided by the contract. Thereafter two other agreements, dated August 5, 1920, and February 28, 1921, were entered into between the plaintiff, the T. A. Scott Co., and the Government, containing further provisions for the determination of the sum to be paid by the Government for the taking of said property and of the sum to be paid by plaintiff for its repurchase. Certain differences having arisen between the parties with respect to these contracts which were the subject of litigation in this court in C-713, said differences were on October 17, 1925, composed and settled and all sums due to the United States and to the Navy Department under said contracts, as adjusted by said settlement, were paid on said date.

Of the wrecking gear used by the plaintiff in the salvage operations hereinafter referred to, a part was throughout owned by said plaintiff, and the remainder, which had been returned to the plaintiff by the Navy as above stated, was in possession of the plaintiff pursuant to said agreements and was being used by it as aforesaid.

IX. The steamship *Relief* carried gear to the value of $61,994.44, the barge *Chittenden* to the value of $30,929.02, the *Chapman Brothers* to the value of $13,055.40, the *Rescue* to the value of $35,680.12, and the *Resolute* to the value of $34,918.04.

During the operations the *Relief* worked 14 days 14½ hours; the *Resolute*, 3 days 12 hours; the *Chapman Brothers*,

5 days 2 hours; the *Rescue*, 3 days 10 hours; and the barge *Chittenden*, 5 days 14 hours.

The plaintiff also employed on said work its general salvage superintendent, 3 other wrecking masters, a force of 7 foremen, 17 pump engineers, 4 carpenters, 4 divers, 4 divers' tenders, 57 wreckers, and 2 timekeepers, in addition to the crews of its vessel, which numbered about 88 men. The total number of the plaintiff's men employed on the work was about 186.

The cost of the operations has been shown by the plaintiff under the following classifications: For use of the various boats, $4,954.34; damages to boats, $2,066.28; labor, $5,039.51; materials completely used, $727.10; material used on the boats *Chapman Brothers*, *Resolute*, and *Relief*, hawser, etc., $2,425.63; material destroyed, $514.10; or a total of $15,-726.96.

During all the time of the salvage operation the sea was especially fine, and, with the exception of the ground swell, which hindered the divers in their operations, the elements caused no embarrassment to the plaintiff in its salvage work.

The rendering of the said services involved risk to the plaintiff of the loss of the gear of the value of about $75,000, which it had on board the *Graf Waldersee*, if the vessel sank into the sand so that water came over her decks or if the sea rose enough to wash over the decks. There was also risk to the plaintiff's vessels because of the necessity of lying close alongside the *Graf Waldersee*, which was much more heavily built than the wrecking vessels, so that there was danger that the wrecking vessels might be seriously damaged by being thrown against the steamship's sides. Damage of this sort occurred during the towage to the extent of about $2,000 in the case of the *Relief*. Damage was also sustained by the *Resolute* and by the *Chittenden*, various lines were broken, and some damage done to the plaintiff's wrecking gear.

X. The cost of repairing the damage to the *Graf Waldersee* which was sustained in consequence of the collision and the grounding was $81,814.39. Her salved value was therefore $1,418,185.61. The value of the coal on board the *Graf Waldersee* which was saved was $25,808. The value of the

supplies, provisions, and baggage on board the *Graf Waldersee* is not established by the evidence.

XI. The services of the plaintiff described above were rendered without express contract on the basis of compensation usual in salvage, namely, that there would be no compensation unless the salvage services were successful, and that, if successful, the amount of the plaintiff's compensation should be determined according to the principles usually applied in salvage cases.

XII. The plaintiff presented a claim for compensation for said services to the Government through the War Department and the Navy Department. The Navy Department advised the plaintiff that the War Department, not the Navy Department, was liable therefor; the War Department advised the plaintiff that it was not authorized or empowered to settle the claim, and that it must be presented to the Court of Claims.

No compensation has been paid to the plaintiff on account of this claim.

XIII. The reasonable value of the salvage services rendered by the plaintiff was $92,500.

The court decided that plaintiff was entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff, a West Virginia corporation engaged in rendering salvage service, sues for an award for such services rendered to the steamship *Graf Waldersee*. The plaintiff maintains a large fleet of steamers, derricks, tenders, and other necessary and modern equipment for the sole purpose of salvaging distressed and stranded vessels. The personnel of its organization is complete and efficient. In order to be within easy access, two stations have been established, one at New York and the other at Norfolk, Va., the plaintiff being enabled to perform both harbor and offshore service.

The steamer *Graf Waldersee* was an ex-German vessel. She was in the possession of and operated by the United States under an international arrangement between the allied and associated powers, Germany, and the United States.

Opinion of the Court

At the time of the accident here involved she was engaged in transport service under the direction of the War Department, and manned by officers and crew of the United States Navy under the direction of the Navy Department.

On June 11, 1919, the *Graf Waldersee* was en route to Brest, France, from New York. There were 600 people on board, 40 officers, 550 men, and 10 passengers, as well as 3,200 tons of coal and about 1,500 tons of provisions. She carried no other cargo, the voyage being destined for the transport of American troops from abroad to the United States. At a point about 25 miles from Ambrose Lightship, in latitude 42 degrees 17 minutes north and longitude 73 degrees 18 minutes west, the steamer *Rodondo*, during a fog, ran into her, striking her on her port side about 350 feet from the bow. The collision occurred at 10.59 o'clock p. m. The collision was a serious one. The damage occasioned by the *Rodondo* threatened the safety of the *Graf Waldersee* and her crew. The immediate danger was in fact so imminent that at 11.02 p. m. S O S calls were dispatched, 10 of the ship's lifeboats had been lowered, and all nonserviceable members of the crew and passengers had been lined up in readiness to go to the lifeboats.

The area of the *Graf Waldersee* damaged was at the coal bunkers alongside the fireroom, and the fireroom was immediately filled with water to such an extent that within a comparatively short time steam pressure was reduced to the extent that the foghorn was barely audible at a distance of 500 feet. The vessel's winches were without power and the lights were all out. Radio transmission was available only through emergency sources, and, taken all in all, the situation was most critical. Designated members of the crew worked heroically in an effort toward temporary repairs; collision mats, tarpaulins, blankets, mattresses, hammocks, and all other available factors were employed in stuffing up the hole in an effort to save the ship. The steamer *Patricia*, a sister ship of the *Graf Waldersee*, responded to the ship's S O S and arrived alongside about 12.43 o'clock the following morning. At this moment nearly 100 of the ship's crew and all passengers were in the lifeboats, and at 1.03 o'clock were

taken aboard the *Patricia*, thus fully attesting the fact of imminent peril to the vessel itself.

Without going into infinite detail, we may observe at this point that despite the efforts of the crew, working steadily with the resources at hand, the water continued to advance, coming in first in one place and then another, until finally the commanders of the vessels reached a decision to tow the damaged ship to the nearest beach. At 3.20 a. m. the *Patricia* made fast two 8-inch hawsers and the towage started. About 7 o'clock in the morning the tugs *Holtex* and *Margaret Sanford* arrived; both took a line to *Graf Waldersee* and assisted in the towing. In the early morning hours of June 12, 1919, the plaintiff was requested, through the office of the commandant of the third naval district of New York, to go at once to the assistance of the *Graf Waldersee*. The plaintiff's steamer *Resolute*, being immediately ready for service and fully equipped with both crew and wrecking appliances, put out from Stapleton, Staten Island, at 3 o'clock a. m. and arrived alongside the *Graf Waldersee* at 7.20 a. m. She was then in tow 22 miles southeast of Ambrose Lightship in 16 fathoms of water. Her engine room was full of water, with 18 feet of water in hold No. 5, 15 feet in hold No. 6, and 13 feet in hold No. 7.

The *Resolute* at once attached herself to the ship and placed on board her two 6-inch pumps and began pumping from 700 to 750 gallons of water a minute. At 9.30 a. m. the personal effects of the crew of *Graf Waldersee* were placed on board the *Resolute*, and at 10.20 a. m. the plaintiff added the towage service of the tug *Juno* in the effort to reach a beach. At 10.45 a. m., after having been towed 22½ miles, she was beached at a point 2 miles from the south shore of Long Island, near Long Beach. She lay with her head toward the beach, resting on a sandy bottom in 6½ fathoms of water forward and 7 fathoms aft. The *Patricia* was unable to complete the beaching of the ship because of danger to herself. Beaching was accomplished by the ship's own momentum, aided by the tugs. She dropped her own bow anchor; the *Juno* carried out her stern anchor and carried back the persons on board the *Patricia* to the ship,

Opinion of the Court

after which the *Patricia* continued on her way. The *Resolute*, from the inception to the completion of the towage, had pumped about 525 tons of water from hold No. 7, and checked the inflow into holds Nos. 6 and 7 by tying mattresses around the openings in ventilators. That this service was effective is demonstrated by the precarious condition of the ship when beached. She was obviously in dire distress and fortunate in reaching a shallow sea just when she did.

Following the beaching of the ship the plaintiff found it necessary to require assistance, and in response to a call therefor the plaintiff dispatched the wrecking barge *Chittenden* in tow of the steamer *Chapman Brothers*, both vessels reaching the wreck at about 7 p. m. of the 12th. On the morning of the 14th plaintiff's steamers *Rescue* and *Relief* joined its fleet, the latter carrying the plaintiff's superintendent of salvage, who immediately took charge of operations.

The findings disclose in detail what was thereafter done. It is not denied that the plaintiff, by employing all its immediate resources and through the instrumentality of powerful pumps and sea divers, succeeded finally in bringing about such a condition that about 3 o'clock p. m. the *Graf Waldersee* was afloat, and thereafter towed by the plaintiff's and Government's vessels until finally placed on dry dock on the afternoon of June 19. It is fairly conceded by the defendant that the services rendered by the plaintiff were substantial and performed expeditiously, and while the assertion is made that the dangers of the situation were more potential than real, the principal objection to a claimed award is a protest against its ascertainment upon a percentage basis.

The *Graf Waldersee* was a steel twin-screw steamship, 561.2 feet long, 62.2 feet in width, and 37.7 feet in depth. She was built in 1898 in Hamburg. Her gross tonnage was 13,193 and her net 8,375. She was easily worth $1,500,000. She was at the time of the accident especially available as a troopship, having been refitted for the purpose. The cost of repairing the damage done her totaled $81,814.39, and coal to the amount of $25,808 was saved. The value of plaintiff's vessels and equipment employed in the service is

accurately given in Findings VIII and IX, together with damages sustained, as well as the cost of operations.

Deducible from this record is the indisputable conclusion that the plaintiff is entitled to a most substantial award. The plaintiff's vessel, the *Resolute*, responded promptly, and, while emergency measures of real merit had taken place prior to her arrival and the distressed ship was in tow, these facts in nowise discredit or seriously minimize the service of the plaintiff from its inception to the close of the successful salvage of the ship. The plaintiff was experienced in salvage service. Its crews, divers, and men were expert in the same. The stranded ship and its crew, while efficiently cooperating with all the plaintiff did, nevertheless recognized the commanding importance of the plaintiff's presence and yielded willing obedience to its adopted measures of obtaining relief. As said by the court in the case of the *City of Worchester*, 42 Fed. 916:

"An important element which enters into the determination of the amount due upon the libel *in rem* is the fact that each salvor is an owner of a valuable plant which is constantly ready for service and equipped with a crew which is constantly under pay. The calls for salvage service are occasional. The necessity of the expenditure for wages and repairs is continuous. The *City of Worcester* had the prompt benefit of a large plant, which was itself in some danger of injury."

It is manifestly idle to hazard a prediction as to what might have happened if the plaintiff's service had not been available. The salvage service was successful, the ship was saved, and the record is replete with facts which clearly disclose her perilous situation and imminent danger of total loss. Salvage awards are difficult to harmonize. The cases establish no uniform amount. In reaching conclusions the facts of the particular case invariably determine the sum. The established precedents point out the factors to be considered, viz: The value of the vessel and cargo salved, the perils and dangers of her situation when accepting service, the dangers incident to the performance of the service by the salvor, the value of the salvor's outfit, the actual expense

incurred by the salvor, and all other pertinent facts and circumstances connected with and incident to the situation involved. Salvage service, in so far as all the cases cited in the brief indicate, is not to be predicated upon a fixed percentage basis.

A service of this character involves an old and oft-repeated rule of including a sum over and above expense and profit sufficiently reasonable to encourage the service, and take into consideration the important fact that any award whatever depends absolutely upon success. When one is willing to hazard, as was done in this case, almost its complete organization and equipment upon the single factor of success, and finally succeeds as the primary agency in saving a vessel of substantial worth, the award to which it is entitled is, in our opinion, to be fixed at a sum commensurate with the actual work involved and the results accomplished.

The plaintiff contends for an award of $150,000. With this contention we disagree. It is, under the facts of the case, more than the record justifies; $92,500, we think, is sufficient. A careful analysis of the record does, in our opinion, sustain an award for this sum, and judgment will accordingly be awarded the plaintiff for $92,500. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

PHILIP ROETTINGER, TRUSTEE IN BANKRUPTCY FOR THE PFAU MANUFACTURING CO., v. THE UNITED STATES

[No. C-1182. Decided April 4, 1927]

On the Proofs

Dent Act; Government officer's lack of authority.—When suit is brought under the Dent Act it is essential that plaintiff show an agreement, express or implied, entered into by him with an officer or agent acting under the authority of the Secretary of War or of the President, and it must appear that the officer or agent was acting within the scope of his authority.

Opinion of the Court

Same; nature of agreement.—The assurance on the part of a Government officer, given to a representative of the plaintiff, that the Government was in the market for or needed ammunition boxes, and that if the plaintiff's plant were put in position to manufacture 5,000 of them per day the Government would be glad to keep the plant going, is not sufficient to imply a contract under the Dent Act.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Messrs. Alfred G. Allen* and *Guido Gores,* and *King & King* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The facts in the case are reviewed in the opinion.

CAMPBELL, *Chief Justice,* delivered the opinion of the court:

Suit is brought by the trustee in bankruptcy of the Pfau Manufacturing Company seeking recovery under the terms of the Dent Act, 40 Stat. 1272. This company was awarded a contract for the making and delivery of 100,000 ammunition boxes at a stated price. The contract for this work was in writing, and a copy of it is made an exhibit to the petition. The 100,000 ammunition boxes were made, delivered, and have been paid for at the contract price. The claim now is that before the execution of the written contract the Government officer at the head of the procurement division promised the Pfau company that if it would promptly equip its plant so as to give it a capacity of 5,000 ammunition boxes per day and would keep its organization intact the said officer "would place a further order for ammunition boxes with said Pfau Manufacturing Company." While the general rule is that all negotiations between parties to a contract are merged in the written contract subsequently made between them, it is not necessary to invoke that rule in the present case, because, referring the matter to the Dent Act, it is quite clear that the plaintiff shows no cause of action.

(1) The officer with whom the Pfau Manufacturing Company dealt was not authorized to make contracts further

Opinion of the Court

than to carry out the instructions of the requirement division. Indeed, he was not at all vested with authority to execute contracts. These were made by a higher official. When suit is brought under the Dent Act it is essential that plaintiff show an agreement, express or implied, entered into by him with an officer or agent acting under the authority of the Secretary of War or of the President, and it must appear that the officer or agent was acting within the scope of his authority. The agreement must be an express one or an agreement "implied in fact," and the act does not enlarge the authority of the agent by whom it is made. *Baltimore & Ohio Railroad Co. case*, 261 U. S. 592, 596, 597; *Baltimore & Ohio Railroad Co.*, 261 U. S. 385.

(2) The evidence falls far short of establishing an agreement. The officer did not assume to have authority to make an agreement such as is here relied upon. The most that can be asserted as to his action is that he assured the company's representative that if the plant were put in position to manufacture 5,000 boxes per day and the Government was "in the market or needed them" the Government would be glad to keep the plant going. If upon this vague statement the Pfau Company made expenditures it did so at its own risk. We have several times had occasion to consider cases involving the question here involved. In *Jacob Reed's Sons, Inc., case*, 60 C. Cls. 97, it was held that the promise of a quartermaster to supply plaintiff with future contracts sufficient to compensate him for additional moneys expended for additional equipment was not such a promise as is contemplated by the Dent Act, and further that a party dealing with an agent of the Government is bound to take notice of the extent of the agent's authority. Again, in the *Morgan Engineering Co. case*, 58 C. Cls. 373, 379, the court said: "A contract can not be implied in a case where no order has been given for the manufacture of the machinery, where no time has been fixed for the commencement of its construction, and where no price has been fixed for its construction." It was said in this case that the plaintiff went ahead without waiting for an order, and must abide by the result of its own action. See *David A. Wright case*, 60 C. Cls. 519; *Lewis Nixon case*, 59 C. Cls. 684; *Booton, receiver, case*, 59 C.

Cls. 566; *Lawrence Leather Co. case*, 61 C. Cls. 304; *J. G. White Engineering Corporation case*, 61 C. Cls. 585, 593.

We have discussed the question more at length than is necessary, because of the fact that under the rule of the Supreme Court both parties not having made a request therefor, a special findings of fact need not be made. The petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

VICTORINO L. SALVADOR v. THE UNITED STATES

[No. D-379. Decided April 4, 1927]

On the Proofs

Army pay; civilian clerk, Philippine Department.—A civilian clerk, native of the Philippine Islands, in the office of the department quartermaster. Philippine Department, whose compensation is adjustable by a board of officers appointed under authority of the Secretary of War, is not entitled to the bonus of $240 per annum provided by section 6, act of March 3, 1921, for civilian employees of the United States Government.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Victorino L. Salvador, a native and citizen of the Philippine Islands, was at all times hereinafter stated a civilian clerk in the office of the department quartermaster, Philippine Department, Manila, P. I.

He was originally appointed such clerk at a salary of $540 per annum October 22, 1909; was promoted to $780 per annum December 1, 1919, with designation changed to typist July 1, 1922. He continued so to serve during the period covered by this claim.

On and prior to June 30, 1921, he was in receipt of the additional compensation or bonus granted by the acts of March 3, 1917 (39 Stat. 1121), July 3, 1918 (40 Stat. 814), March 1, 1919 (40 Stat. 1267), and May 29, 1920 (41 Stat. 689), in addition to his regular salary. During the fiscal year from July 1, 1920, to June 30, 1921, he was certified as entitled thereto under the provisions of section 6 of the act of May 29, 1920 (41 Stat. 689).

II. Under date of December 15, 1920, the Secretary of War approved the following recommendation:

WAR DEPARTMENT,
Washington, December 13, 1920.

From: The Quartermaster General of the Army, the Chief of Engineers, and the Chief of Ordnance.
To: The Secretary of War.
Subject: Authority to a board of officers to establish wage schedule of native employees in the Philippine Islands.

Authority is requested to authorize the Quartermaster General, the Chief of Engineers, and the Chief of Ordnance to designate or appoint officers stationed in the Philippine Department to act for their respective chiefs in the matter of approving wage schedules of native employees in the Philippine Islands.

It has been customary to forward to Washington recommendations of the engineer officer, the quartermaster, and the commanding officer of the Manila Arsenal in order to secure approval of wage schedules. This has been entirely practicable in connection with activities of the three bureaus in so far as the activities are carried on within the continental limits of the United States and in so far as the activities affect American-born workmen at the various establishments within the United States.

It is desirable to avoid the necessary delay in forwarding to Washington for approval wage schedules which affect native employees hired by the respective bureaus in the Philippine Department. It is desirable to have these native employees rated, classified, and paid with substantial uniformity so that there should be no material difference among the employees of the three bureaus.

It is recommended that a board of officers be authorized to function as and for the Quartermaster General, the Chief of Engineers, and the Chief of Ordnance, to the end that these officers, not less than three, designated by the chiefs of the three bureaus, may finally approve wage schedules affecting native employees hired in connection with the local activities of the three bureaus, the Quartermaster Corps, the Engineer

Corps, and the Ordnance Department, such officers being commissioned officers detailed by their respective chiefs for duty in the Philippine Islands from time to time.

Authority is requested for the establishment of such a board of officers, to the end that it will be unnecessary to forward to Washington for approval wage schedules affecting native employees, with the understanding that the Quartermaster General, the Chief of Engineers, or the Chief of Ordnance may at any time withdraw from the arrangement outlined above, and may resume the practices which have heretofore prevailed in the matter of wage-schedule approvals.

LANSING H. BEACH,
Major General, Chief of Engineers.
H. L. ROGERS,
Quartermaster General.
C. C. WILLIAMS,
Major General, Chief of Ordnance.

Approved.

(Sgd.) NEWTON D. BAKER,
Secretary of War.

DECEMBER 15, 1920.

Pursuant thereto Special Orders, No. 298, dated December 23, 1920, Headquarters Philippine Department, Manila, P. I., was issued in part as follows:

"3. Pursuant to instructions contained in cablegram from the War Department, dated December 21, 1920, and by authority of the Secretary of War, a board of officers, to consist of Col. William S. Scott, Quartermaster Corps; district engineer officer in charge of defensive works; and commanding officer Manila Ordnance Depot, is appointed to meet in this city at the call of the senior member for the purpose of approving rates for native employees of the Engineer Corps, Ordnance Department, and Quartermaster Corps in the Philippine Islands."

June 13, 1921, the board appointed by the preceding orders met and took proceedings as follows:

"The senior member called the attention of the board to the following new provision of law contained in section 6 of the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1922, approved March 3, 1921, with regard to increased compensation for civilian employees of the Government: 'The provisions of this section shall not apply to the following employees whose pay is adjustable from time to time through wage boards or

Reporter's Statement of the Case

similar authority to accord with the commercial rates paid locally for the same class of service,' in view of which the board decided that the increased compensation could not legally be paid after July 1, 1921, to those native employees whose wages were fixed by the wage board, and that it would be necessary to readjust the wages in order that the increased compensation heretofore paid might be considered as a part of their base pay, in the event that such base pay did not exceed that paid locally by commercial firms.

"3. The board was of the opinion that the present rates of pay, including the increased compensation of native employees of the Engineer Corps, Ordnance Department, and Quartermaster Corps in the Philippine Islands do not exceed the commercial rates paid locally for the same class of service and agreed upon the following as the rates to govern for native employees commencing July 1, 1921:"

Here follows a list consisting of "Boat employees," "Miscellaneous," and "Other native employees." Under the last-named heading are the following titles:

Designation	Minimum		Maximum	
	Per month	Per day	Per month	Per day
Clerk	$15		$100	
Messenger	10		40	
Stenographer	50		85	
Typist	15		50	

The report concludes:

"4. It was agreed that, for the purpose of this wage board, the word 'native' is defined as embracing all Filipinos and mestizoes born and raised in the Philippine Islands and all Japanese and Chinese; also that nothing in these proceedings shall apply to classified native employees of the Engineer or Quartermaster Corps, as their rates of pay are fixed by the Secretary of War on recommendations of the Chief of Engineers or the Quartermaster General. In the Quartermaster Corps these rates are based on recommendations of the quartermaster, Philippine Department, and promotions are made in the order of merit as established by the last semiannual efficiency report, as contemplated by par. 196, vol. 1, Manual for the Quartermaster Corps, 1916.

"5. The wages paid to native employees in each locality in the Philippine Islands by the Engineer Corps, Ordnance

Department, and Quartermaster Corps must come within the minimum and maximum fixed by this wage board, but they will not exceed the local prevailing rates paid to natives in the locality for the same class of services. Local representatives of the Engineer Corps, Ordnance Department, and Quartermaster Corps will cooperate with each other in order that the rates paid by each department are the same for the same class of work and experience.

* * * * *

"W. S. SCOTT,
"*Colonel, Quartermaster Corps, Senior Member.*
"F. A. POPE,
"*Lieutenant Colonel, Corps of Engineers, Member.*
"A. F. CASAD,
"*Major, Ordnance Department, Member.*"

III. The following circular letter was issued from the office of the Quartermaster General of the Army at the date stated:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL,
Washington, April 17, 1922.

Circular Letter No. 42.
Subject: Salaries and wages.

In order that the same classification of employees under the terms "salaries" and "wages" is made by all quartermasters in the field, the following definition is submitted for the information of all concerned:

"Salaries" will include supervisory, clerical and office force, messengers, janitors, attendants, etc., and will exclude pay to wage employees.

"Wages" will include all skilled and unskilled labor, such as mechanics, apprentices, teamsters, day laborers, and temporary mechanical help.

By direction of the Quartermaster General.

A. OWEN SEAMAN,
Lieutenant Colonel, Q. M. C.,
Assistant Executive Officer.

IV. From and after July 1, 1921, plaintiff received during all the period covered by this claim the same basic salary of $780 a year that he had previously been receiving, but received no bonus or additional compensation under the acts of March 3, 1921, 41 Stat. 1252, 1308, June 29, 1922, 42 Stat. 712, and March 4, 1923, 42 Stat. 1557.

Opinion of the Court

On application, first, to the Secretary of War and afterwards to the Comptroller General of the United States for payment of such bonus the same was disallowed on the ground that plaintiff's salary having been fixed by a wage board within the provisions of all such acts he was excluded from the receipt of the additional compensation or bonus provided by those acts.

V. The amount of the increased compensation or bonus for the three fiscal years ending, respectively, June 30, 1922, 1923, and 1924, at the rate of $240 a year is $720.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, Victorino L. Salvador, a native of the Philippine Islands, was appointed to the position of civilian clerk in the office of the department quartermaster, Philippine Department, October 22, 1909, at a salary of $540 per annum. In December, 1919, his compensation was increased to $780 per annum, and still later his designation was changed to clerk-typist, and he has continuously thereafter served in that capacity. On and prior to June 30, 1921, plaintiff was in receipt of the extra compensation or bonus of $240 per annum in addition to his regular salary. On December 15, 1920, the Secretary of War approved a recommendation of the proper military officers in the Philippine Islands for the appointment of a joint wage board, with authority to establish a wage schedule for native employees in the Philippine Islands. Under the schedule as established by said board, the additional compensation or bonus of $240 per annum from and after July 1, 1921, was denied plaintiff, and the salary previously received by him was reduced by that amount. Section 6 of the act of March 3, 1921, providing the additional compensation for the fiscal year ending June 30, 1922, 41 Stat. 1308, 1309, being the first fiscal year here involved, omitting immaterial portions, is as follows:

"That all civilian employees of the Governments of the United States and the District of Columbia who receive a total of compensation at the rate of $2,500 per annum or less, except as otherwise provided in this section, shall receive

during the fiscal year ending June 30, 1922, additional compensation at the rate of $240 per annum:

* * * * * * *

"The provisions of this section shall not apply to the following: * * * employees whose pay is adjustable from time to time through wage boards or similar authority to accord with the commercial rates paid locally for the same class of service."

Plaintiff comes clearly within the operation of the above provisions, and it seems unnecessary to review in detail the various contentions urged in his behalf.

It is therefore the judgment of the court that plaintiff's petition be, and the same is hereby, dismissed. And it is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. THE UNITED STATES

[No. B-104. Decided April 4, 1927]

On the Proofs

Salvage services; basis of compensation.—See *Merritt & Chapman Derrick & Wrecking Co.* v. *United States, ante,* p. 297.

The Reporter's statement of the case:

Mr. John W. Griffin for the plaintiff. *Mr. L. Russell Alden* and *Haight, Smith, Griffin & Deming* were on the briefs.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. W. Clifton Stone* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and existing under the laws of the State of West Virginia, having its principal place for the transaction of business in the city, county, and State of New York.

II. At all times hereinafter mentioned and for many years prior thereto, the plaintiff maintained a large fleet of derricks, steamers, tenders, and other apparatus used and equipped for the purpose of recovering and salvaging vessels, and at all times maintained and operated said fleet with its equipment for the purpose of salvaging vessels in the Atlantic Ocean and the waters adjacent to the Atlantic coast of the United States and tributary waters, and has maintained various wrecking stations fully equipped for rendering salvage services at short notice, among which stations is one located at the city of New York. In general its work was divided into two classifications—offshore and harbor. Its offshore department represented an investment of about one million and a half dollars.

III. The steamship *El Sol*, on and prior to February 11, 1918, and during the entire period covered by the services rendered to the said vessel by the plaintiff herein, was an American steamship under bareboat charter to the United States of America through the United States Shipping Board, and allocated to the Department of War of the United States of America upon the same basis, manned by a United States Navy crew and maintained, operated, and employed by the said Department of War of the United States of America in transport service of the United States Army. The said bareboat charter provided, among other things, as follows:

"Second. The United States at its sole expense, shall man, operate, victual, and supply the vessel.

"Third. The United States shall pay all port charges, pilotages, and all other costs and expenses incident to the use and operation of the vessel.

"Fourth. The United States shall assume war, marine, and all other risks of whatsoever nature or kind, including all risk of liability for damage occasioned to other vessels, persons, or property."

IV. The said steamship *El Sol* was a steel screw steamer of 6,850 tons deadweight capacity, 6,008 tons gross register, 405 feet 6 inches in length, 53 feet beam, and 27.4 feet deep. The sound value of the said steamship, including engines, boilers, tackles, apparel, and furniture, but excluding cargo, was $1,370,000. At the time of the rendition of the service

hereinafter set forth the said steamship had on board a cargo of over 4,000 tons of war supplies, including therein stores, coal, grain, and 640 mules and 10 horses. The said cargo on board belonged to and was owned by the United States of America and was of the value of approximately $690,000.

She carried a civilian crew of 68, a gun crew of one naval officer and 23 men, and an Army quartermaster and 50 or 60 enlisted men.

V. On February 11, 1918, at about 5.50 o'clock in the morning, the said steamship being then on a voyage from Newport News, Va., to New York, from which latter port she was to proceed in convoy for Europe, went aground on the New Jersey coast about one-half mile off the north end of Beach Haven. She came up in hard sand on a table of the beach (i. e., where the soundings run regularly the length of the ship). Her draft at the time she was stranded was 25 feet 6 inches forward and 25 feet 3 inches aft, and where she was aground there was 23 feet of water. The tide was at its peak.

She lay heading about 5° east of north, practically parallel to the beach, in a slight cove. This cove afforded protection to her from a direct current heading up and down the beach, but gave no protection against winds which might have come from the northeast and south and points between, running clockwise from northeast.

VI. At 7.10 a. m. the tug *O. L. Hollenback* came alongside in response to a signal from the *El Sol*. At that time the *El Sol*, under her own power, was gradually swinging her head to the eastward. A hawser was fastened to the starboard bow of the *El Sol*, and the *O. L. Hollenback* pulled for about an hour and 20 minutes, during which time the *El Sol* swung around to north 80° east. At that point no further swing was noticeable. The tug was then transferred to the stern of the *El Sol* and the engines were reversed, but without effect. At the *El Sol's* request, the tug thereupon stopped pulling and released its hawser. The tug then, at about 9.30 a. m., proceeded on her course.

VII. Thereafter, at about 10 a. m., the *El Sol* communicated the fact of her distress to the Army Transport Service

at Hoboken, N. J., which in turn, through Captain Baker, requested assistance from the plaintiff company. This request was received at 12.15 p. m., February 11, 1918, at Stapleton, Staten Island, which was the base of the *Relief*, a salvage vessel belonging to the plaintiff company. As was customary for purposes of emergency, this vessel had steam up, and could have moved to the assistance of the *El Sol* in approximately half an hour. However, plaintiffs's orders were to wait for Captain Bernard, marine superintendent of the United States Army Transport Service at Hoboken. He arrived at 1.10 p. m., and the *Relief* left immediately for the scene of the stranded vessel.

VIII. The *Relief* was a specially built salvage vessel of 828 gross, 563 net tons, and was equipped with all modern appliances for salvage work. She had an indicated horsepower of 1,500. Her value was $425,000. She employed a wrecking crew of 31, and, in the case of emergency salvage work, an additional wrecking crew of 10 or upward in number. Her captain, Herbert R. Foster, and the members of the crew were all men of long experience and training in salvage work. She carried equipment for salvage work of the value of about $38,000.

IX. At about 5.30 p. m. the submarine chaser patrol *Emerald* came alongside the *El Sol* and offered assistance, but the time was not opportune and she was not used. She was a small vessel and incapable of rendering assistance.

X. The *Relief* arrived at the side of the *El Sol* at 7.40 p. m. February 11, and transferred a portion of her crew to the deck of the latter and immediately began salvage operations. Under the direction of Captain Bernard, soundings were taken and showed good depth of water astern and that she was sandbound mostly forward from foremast to smokestack.

The *Relief* first laid a running line to the *El Sol* and by 9.45 p. m. her 12-inch towline was made fast to the stern of the stranded vessel. The *Relief* started immediately to tow and pulled until 11.15 p. m. with little apparent movement on the part of the *El Sol*.

Reporter's Statement of the Case

XI. The *Relief* then anchored and at 4.10 a. m. February 12 resumed towing and pulled until 9 a. m. The ship's engines were worked astern during about an hour of this time. The towing resulted in swinging the stern of the *El Sol* approximately 97°.

The towline was then taken off and the *Relief* began to fasten cables to the *El Sol* and to lay anchors, and at 9.20 a. m. the crew of the *El Sol*, in accordance with a plan agreed upon by officers of the two ships, began to throw overboard 282 tons of hay and oats of the value of $13,000, and 165 tons of water. This work took from three to four hours and lightened the ship about 18 inches forward and 14 inches aft. An attempt had previously been made to obtain lighters in order to save this cargo, but none were available.

Meanwhile the *Relief* was engaged in laying anchors. The first cable and anchor was laid at 11 a. m. from the *El Sol* stern about two points on the starboard quarter, and the second cable and anchor was laid at 2.15 p. m. at about four points on the starboard quarter. These anchors were the property of the plaintiff company and were specially constructed and made of cast steel and had exceptionally large flukes. The anchors weighed 9,000 pounds apiece, and the cables used to attach them to the ship were 15 inches. These cables were made taught by windlasses on the *El Sol* and the strain on them was thereafter continuous.

At 6 p. m. the *Relief* again began towing and pulled until 10 p. m. The only movement of the ship resulting from this towing and use of the cables and anchors was the swinging of the stern approximately 11° seaward.

XII. At about 3 o'clock in the morning of February 13 the Army Transport Service tugboat *No. 3* arrived on the scene in response to a request by Captain Bernard. This tugboat was 115 feet in length, 27.5 feet in breadth, 15.5 feet in depth, with a draft of 13 feet, was built of steel, was of 284 gross tons, 193 net tons, and had an indicated horsepower of 1,100–1,200. She was a very powerful tug. She carried 150 fathoms of new 7-inch line.

XIII. The *Relief* again started towing at 4.20 a. m. February 13, 1918, and strain was further placed on the cables.

At 6.30 a. m. the Army Transport Service tugboat *No. 3* was attached to the *Relief* and started pulling ahead of her at 7 o'clock. The *El Sol* began to move seaward. Because of the lack of design for the purposes used, the Army Transport Service tugboat was not able to keep in line with the *Relief* and hindered the latter in pulling, and at 7.30 the tugboat was shifted so as to pull on the ship's port quarter. Meanwhile the cables were again tightened, and with the two tugs pulling and the strain on the cables the *El Sol* was brought clear of the shoal at 8.15 o'clock a. m. The *El Sol's* main engines were used as soon as she had started to move astern. No damage to the vessel was discernible, and at 8.40 a. m. she was under way by her own steam to New York, where she was inspected, found to be in good condition, and proceeded two days thereafter to France. The *Relief* spent some time in picking up the ground tackle which had been laid, and returned to her base at Stapleton, Staten Island, at 6.50 p. m. that evening, and during the next day was reconditioned for future salvage work.

XIV. During the time she was aground the *El Sol* was subject to the possibility that the action of the sea would cut sand away from under her bow and stern, leaving her hung up amidships and in such a position that she might break in two; that she might be strained, which would result in taking in water and sand and sinking deeper; and that she might be set up further on shore by action of wind and seas.

The Jersey coast is a very dangerous one, and the vessels were at all times during salvage operations subjected to possible sudden and violent northeast and southeast winds which were to be expected at that time and place. Favorable weather was, however, experienced throughout the time of the salvage operations and at no time were the vessels in immediate jeopardy.

XV. The pull exerted by the use of the ground tackle was 52 tons, that of the *Relief* 9 tons, and the Army Transport Service tugboat *No. 3*, 7 tons. Besides its pulling power, the ground tackle was particularly valuable in maintaining what-

ever advantage had been gained from time to time by the pulling.

XVI. The work of heaving on *El Sol's* capstans and of watching and tending the cables was performed exclusively by the plaintiff's men. The possibility of the tackle giving way when under heavy strain makes this work highly dangerous to those working near by. On two occasions it did give way, but without resulting in injury to anyone.

XVII. The services of plaintiff described above were prompt and highly efficient and were rendered without express contract, the basis of compensation being that usual in salvage.

XVIII. The plaintiff presented a claim for compensation for said services to the Government through the War Department, which offered payment in the sum of $6,949.49, which was refused by the plaintiff. The claim was also presented to the Shipping Board, which refused to entertain it on the ground that *El Sol* had been allocated to the War Department. No compensation has been paid to the plaintiff on account of this claim.

XIX. The plaintiff's salvage service was reasonably worth the sum of $42,000.

The court decided that plaintiff was entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

This is a salvage service case. Liability to pay is conceded, the only issue involved being one of amount. The plaintiff seeks an award of $60,000, the defendant contends for a substantial reduction and while not insisting upon a certain sum strenuously objects to the claim as disproportionate to the service rendered. The plaintiff is a West Virginia corporation having its principal place for the transaction of business in New York City. Plaintiff maintains, and has for many years maintained a fleet of steamers, derricks, and complete wrecking apparatus devoted exclusively to salvage service.

On February 11, 1918, the plaintiff responded to a request from the proper officials to furnish immediate assistance to the steamer *El Sol*. The steamer *El Sol* went aground at about six o'clock in the morning of February 11, 1918, on a

sand bar from three-quarters to a mile distant from the beach on the New Jersey coast off the north end of Beach Haven. The *El Sol* was a steel-screw steamer of 6,850 tons deadweight capacity, 405½ feet long, a 53-foot beam, and 27.4 feet deep. She was worth at the time $1,370,000 and had on board a cargo of over 4,000 tons of war supplies, 640 mules, and 10 horses, a cargo of the conceded worth of approximately $690,000. The *El Sol* was at the time under a bareboat charter to the United States and employed in war service; she had sailed from Newport News, Virginia, on her preliminary voyage to New York, whence she was to proceed in convoy to Europe. The immediate need of the vessel was an important factor, and her location at the time of the salvage service was fraught with grave danger.

We need not advert in infinite detail to the service of the plaintiff; the findings disclose the transaction. It is sufficient for present purposes to state that after repeated efforts and the application of the best and most approved modern methods the plaintiff succeeded in setting the *El Sol* afloat about 8.15 p. m. February 13, 1918. The defendant contends for various intervening incidents calculated to minimize the service rendered and reduce its value. Fortunately for the steamer and the salvor, the weather was ideal. This, of course, minimizes to some extent the inherent perils of the salvage service, but it does not dispel them; nor does the condition entirely remove the danger the steamer was in.

The record firmly establishes that the accident occurred at a point along the Jersey coast where immediate and great peril to a stranded vessel might well be anticipated at that particular season of the year. The steamer was undoubtedly hard aground; she was so firmly stranded in the sand that despite the efforts of the plaintiff and the jettisoning by the master of 447 tons of her cargo, it required more than two days to set her afloat, resulting in a loss of cargo amounting to $13,000. Again, it is said that the Army transport tug *No. 3* contributed in no small way to the salvage service. The Army transport tug *No. 3* was a powerful tug; she was 115 feet long, 27.5 feet wide, 15.5 feet deep, with a draft of

13 feet, built of steel, 284 gross and 193 net-weight tons' capacity, 1,100 to 1,200 horsepower, and carried with her 150 fathoms of new 7-inch line. That this tug was utilized in the service is indisputable, and the fact of its use unmistakably indicates that it was of some importance.

The plaintiff indubitably was by far the primary factor in accomplishing a successful salvage. The plaintiff's sole business was rendering salvage service. For this purpose plaintiff maintained all necessary vessels and equipment as well as a trained and experienced complement of crews and men in its employ. Its response to the call for help was prompt, and as we have found, its service was "highly efficient." The service rendered involved imminent danger to a large and most valuable vessel and cargo, a vessel urgently needed in the war service, and needed without delay. The defendant offered to pay the plaintiff $6,949.49; the plaintiff refused the offer. The sum offered, in our opinion, is far below the amount earned. To salvage a vessel and cargo whose combined worth totals $2,047,000 is, according to the standard of awards in similar cases, worth considerably in excess of the mere cost to the salvor of his service plus a reasonable profit.

The uniform rule in salvage cases is one of more or less liberality, awarding salvors not alone a sufficient sum to cover expenses and profit, but including therein a reward, a stipend of sufficient proportions to encourage the service and not discount its general importance. Considering, then, the factors which the defendant suggests, the labor expended by the salvor in conjunction with the Army transport tug *No. 3*, the promptitude and skill displayed in rendering the service, and aid in saving the property, the value of the property employed by the salvors and the risk assumed, the value of the property saved, and the degree of danger from which it was rescued, giving to all these the importance the facts establish, we are of the opinion that a fair and just award would be $42,000. Judgment will be awarded plaintiff. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

Reporter's Statement of the Case

ROBERT FORTSON v. THE UNITED STATES

[No. C-374. Decided April 4, 1927]

On the Proofs

Navy; change of station; travel of dependents and transportation of household effects; authority therefor.—The act of May 18, 1920, must be strictly complied with. It does not permit payment of the expenses of travel of wife and dependent children or reimbursement for the transportation of household effects to other than a permanent station as therein defined, and an officer granting such travel or transportation does so without authority.

The Reporter's statement of the case:

Mr. Cornelius H. Bull for the plaintiff. *King & King* were on the briefs.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On March 26, 1920, and prior thereto plaintiff was serving as a lieutenant in the United States Navy on duty at the plant of the New York Shipbuilding Co., Camden, N. J.

II. On or about March 29, 1920, plaintiff received orders of the Navy Department dated March 26, 1920, detaching him from his then present station and directing him to report to Philadelphia, Pa., to the naval inspector of machinery for duty in connection with the fitting out of the U. S. S. *Parrott* and on board that vessel as executive officer when the *Parrott* was commissioned. Pursuant to these orders plaintiff reported to the naval inspector of machinery and to the prospective commanding officer of the U. S. S. *Parrott* on April 1, 1920. The *Parrott* was commissioned on May 11, 1920, and plaintiff reported to the commanding officer for duty on that vessel the same day.

At the time plaintiff reported to said U. S. S. *Parrott* this vessel was at the navy yard in Philadelphia, which was her fitting-out or home yard.

III. After several trips to Boston and other places on the Atlantic coast, the home yard of the U. S. S. *Parrott* was, on June 29, 1920, designated by the Navy Department as Mare Island, Calif., upon arrival of this vessel on the west coast. The U. S. S. *Parrott* received orders on the 27th day of July, 1920, to proceed to the Pacific for duty. On August 14, 1920, the U. S. S. *Parrott* left Hampton Roads, Va., arrived at Cristobal, Canal Zone, on August 21, 1920, departed for Balboa, Canal Zone, on August 27, 1920, and arrived at San Diego, Calif., on September 7, 1920.

IV. In August, 1920, plaintiff verbally requested the supply officer at the receiving station, navy yard, Philadelphia, Pa., for transportation for dependents and for authority to pack, crate, and ship his household effects from Athens, Ga., to San Diego, Calif. The request for transportation was granted and issued to plaintiff's dependents from Athens, Ga., to San Diego, Calif.

Plantiff received a memorandum from the supply officer of the navy yard at Philadelphia, Pa., directing him to apply to the supply officer at Mare Island, Calif., for authority to ship his household goods, and to submit a claim therefor for reimbursement of expenses incident to this shipment. Plaintiff crated and shipped said household effects from Athens, Ga., to San Diego, Calif., at an expense of $122.60. Thereafter he presented a claim for reimbursement to the Auditor for the Navy Department in October, 1920, but the claim was disallowed under date of March 24, 1921. Subsequently, plaintiff's account was checked and there was deducted from his pay by his supply officer the amount of $110.23, the cost of transporting plaintiff's dependents from Athens, Ga., to San Diego, Calif., as aforesaid.

V. If entitled to cost of transportation of his dependents from Athens, Ga., to San Diego, Calif., and for crating and shipping his household effects from Athens, Ga., to San Diego, Calif., there would be due plaintiff the sum of $232.83.

The court decided that plaintiff was not entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by an officer of the Navy for the sum of $232.83, made up of two items, the first item being

Opinion of the Court

for $122.60 which the officer paid for the transportation of his household effects from Athens, Ga., to San Diego, Calif., for which sum he submitted a claim to the Navy Department, payment of which was denied. The second item is for the sum of $110.23, the cost of transporting his dependents from Athens, Ga., to San Diego, Calif., which sum was first allowed and paid but was afterwards deducted from his pay.

The plaintiff claims under the provisions of the act of Congress of May 18, 1920, 41 Stat. 604, which reads as follows:

"SEC. 12. That hereafter when any commissioned officer, noncommissioned officer of the grade of color sergeant and above, including any noncommissioned officer of the Marine Corps of corresponding grade, warrant officer, chief petty officer, or petty officer (first class) having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind from funds appropriated for the transportation of the Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, and the Public Health Service to his new station for the wife and dependent child or children: *Provided*, That for persons in the naval service the term 'permanent station,' as used in this section, shall be interpreted to mean a shore station or the home yard of the vessel to which the person concerned may be ordered; and a duly authorized change in home yard or home port of such vessel shall be deemed a change of station: *Provided further*, That if the cost of such transportation exceeds that for transportation from the old to the new station the excess cost shall be paid to the United States by the officer concerned: *Provided further*, That transportation supplied the wife or dependent child or children of such officer to or from stations beyond the continental limits of the United States shall not be other than by Government transport, if such transportation is available: *And provided further*, That the personnel of the Navy shall have the benefit of all existing laws applying to the Army and the Marine Corps for the transportation of household effects."

The first proviso in this section defines specifically "that for persons in the naval service the term 'permanent station' shall be interpreted to mean a shore station or the home yard of the vessel to which the person concerned may be ordered." In the instant case the home yard of the vessel to which the plaintiff was ordered was Mare Island, San Francisco, Calif.,

Opinion of the Court

and not San Diego, Calif. The plaintiff's dependents and his household goods began their transportation at Athens, Ga., and ended at San Diego, Calif. The language of the statute is definite, and those claiming under it must be held to its terms. It is not within the authority of a supply officer to change the terms of the act, and to confer benefits upon an officer which are clearly not within the provision of the statute; nor can the court, because of what seems a hardship, construe the act to mean what it plainly does not mean. It is manifestly necessary in putting into force acts intended to confer benefits and privileges upon the officers of the Army or Navy, that some specific rules shall be put into effect which will enable the departments to know just what is being done in enforcing such acts. In this case no written request was made by the plaintiff for the transportation of his dependents or his household effects. The supply officer at Philadelphia granted the request for the transportation of the plaintiff's dependents from Athens, Ga., to San Diego, Calif., but directed the plaintiff to the supply officer at Mare Island, San Francisco, for authority to transport his household effects. The only authority which the supply officer, either at Philadelphia or San Francisco had was conferred by the statute above quoted, and when the supply officer at Philadelphia granted transportation for the plaintiff's dependents from Athens, Ga., to San Diego, Calif., he exceeded his authority. The plaintiff in the case of the transportation of his household effects, chose, without waiting for authority from the Navy Department, to transport his household effects at his own expense, and when he submitted a claim for the expense so incurred it was denied by the Auditor for the Navy Department.

We think that the terms of the statute must be strictly complied with, and can not grant the relief asked for in this case.

The petition of the plaintiff must be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

NATIONAL RUBBER FILLER CO. v. THE UNITED STATES

[No. D-1027. Decided April 4, 1927]

On the Proofs

Taxes; tire filler.—Plaintiffs' product, used to fill up the inside of worn-out tire casings of automobiles, is not taxable under section 900 of the revenue acts of 1918 and 1921.

The Reporter's statement of the case:

Mr. Joseph M. McCormick for the plaintiffs. *Etheridge, McCormick & Bromberg* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs, National Rubber Filler Company, are a copartnership composed of W. W. Major, Q. C. Stanberry, and E. L. Bynum, all of whom reside at Midlothian, in Ellis County, Texas, at which place the business of said firm is transacted.

II. The plaintiffs are now, and at all the times hereinafter mentioned were, engaged in the business of manufacturing and selling a material known as "National Tire Filler." Said material, which is the subject matter of the tax in suit, was sold by plaintiffs and used as a filler for the casings of motor and other vehicles. Said tire filler is made from old, worn-out rubber inner tubes purchased by plaintiffs from junk dealers. Such old worn-out inner tubes, after being brought to plaintiffs' plant, are cut up by machines into small particles and mixed with a cement, and the resulting mixture is vulcanized and formed into long cylindrical sticks varying in diameter. Such cylindrical sticks are then cut into chunks or sections. These chunks of filler are sold by plaintiffs in bulk, put up in sacks. Plaintiffs' tire filler is used to fill up that space on the inside of the tires or casings of motor and other vehicles which is filled by inflated inner tubes when

pneumatic tires are used with inner tubes. The purchaser who has occasion to use the filler uses as many chunks or fractions of chunks as may be necessary to fill the casing, used properly, so that it will withstand the weight of the vehicle and the load, the size of the chunk and the number necessary to be used in a casing being dependent upon the size of the casing to be filled.

III. The plaintiffs' tire filler is not sold and has not been sold to automobile concerns for the purpose of equipping new automobiles; only an insignificant percentage is sold for use in new casings. Said filler is sold for use and used almost entirely in old casings which have become too worn and too weak to withstand the pressure of an inner tube inflated with air. When said tire filler is thus used the usefulness of such worn casings is prolonged by several hundreds or thousands of miles, because it is possible when the filler is used to use the casing until it is worn completely down to the filler. The plaintiffs' filler can be used in any pneumatic tire casing and in casings of vehicles other than automobile trucks, automobile wagons, other automobiles, and motor cycles. It has been sold by the plaintiffs for use in the casings of trailers, tractors, and airplanes; it is sold by plaintiffs directly to the owners of such motor and other vehicles. It is, and has been, less expensive than a new casing and a new tube, and practically all of plaintiffs' sales are to the owners of light cars and trucks and to those who use motor vehicles as a matter of necessity rather than luxury, and who desire to economize.

IV. Plaintiffs' tire filler is not and has not been sold to dealers in parts or accessories for automobile trucks, automobile wagons, other automobiles, or motor cycles. It is not carried in stock by dealers in parts and accessories for such vehicles. Such tire filler is not identical with any component "part" of an automobile truck, automobile wagon, other automobile, or motor cycle which has become broken or worn out.

V. The plaintiffs have been engaged in the manufacture and sale of said tire filler since the year 1912; they have advertised their product since that time in motor journals and other publications throughout the country. The tire filler

is and has been a well-known commodity since the year 1912; it has been manufactured and sold by others than plaintiffs since before the year 1912. It has been extensively advertised by companies other than plaintiffs, notably by the Essenkay Company, of Chicago, Illinois, said company having spent between $200,000 and $400,000 between 1912 and 1921 advertising its product through such mediums as the Saturday Evening Post, Collier's, Literary Digest, Munsey's, McClure's, and American Magazine; also newspapers, such as the Chicago Tribune, the New York Journal, the Washington Post, Cleveland Plain Dealer, and others; also farm papers, such as the Country Gentleman, Michigan Farmer, Rural New Yorker, and others, as well as practically all of the standard motor-trade publications.

VI. The plaintiffs between June 2, 1919, and February 4, 1923, paid to the collector of internal revenue, acting on behalf of the United States, the sum of $19,946.39 taxes and penalties on tire filler sold by it; said taxes and penalties were levied, assessed, collected, and paid under the provisions of section 900 of the revenue acts of 1918 and 1921. Said taxes and penalties were paid by plaintiffs under a second notice and only after being notified by the collector of internal revenue that if they were not paid it would cause trouble and plaintiffs would be liable to the payment of penalties, and said taxes and penalties were paid under protest. An appeal has been duly made to the Commissioner of Internal Revenue for the refund of said taxes and penalties, and a decision of the commissioner has been made therein refusing to refund the same; no other action has been had on said claim.

The court decided that plaintiffs were entitled to recover the sum of $19,946.39, with interest thereon at the rate of 6 per cent per annum from February 4, 1923, to April 4, 1927, amounting to $4,986.59; in all, $24,932.98.

BOOTH, *Judge*, delivered the opinion of the court:

Section 900 of the revenue acts of 1918, 40 Stat. 1122, and 1921, 42 Stat. 291, provides as follows:

"SEC. 900. That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the

Opinion of the Court

manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum; (2) other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum; (3) tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

The Commissioner of Internal Revenue levied and collected, over plaintiffs' protest, under the foregoing sections of the laws cited, for the period from June 2, 1919, to February 4, 1923, a revenue tax on plaintiffs' product of $19,-946.39. This suit is for the recovery of the amount of taxes so paid. No jurisdictional issue is involved.

Plaintiffs are copartners doing business at Midlothian, Texas, under the firm name of National Rubber Filler Company. In the year 1912 they began the manufacture and sale of a product which they designated as a tire filler. Plaintiffs purchased from junk dealers a large number of used, old, and discarded inner tubes; i. e., worthless inner tubes, so far as use in a pneumatic motor-vehicle tire is concerned. These are then reduced by machines to innumerable and fine particles of rubber and subsequently vulcanized after the addition to the mass of fixed quantities of cement. The vulcanizing process is followed by molding the heated product into long cylindrical-shaped sticks of solid rubber, and these in turn are cut into sections or chunks approximately three inches in length at the top and two and a half inches at the bottom. The difference in length between the top and bottom enables a purchaser of chunks to adapt them for use in a motor-vehicle tire; that is, the outer casing. This product is sold direct to the purchaser. It has found no market otherwise. A purchaser informs the plaintiffs as to the size of the outer casing, and the plaintiffs place in a sack and ship to him a sufficient number of "chunks" to completely fill and encircle the described casing.

Opinion of the Court

The commercial value of the filler emanates from its ability to enable the owner of a badly worn and dilapidated outer casing, one so far gone that it will no longer support the air pressure of an inflated inner tube, to obtain from such an outer casing an increased mileage; otherwise the outer casing would have to be discarded and a new one supplied. It serves to materially prolong the life of the outer casing. Manifestly it could be used in new outer casings; but it is not so generally employed. for the ordinary motor vehicle user prefers the easy ride of a pneumatic inner tube to the material reduction of resiliency produced by the use of the filler. The record establishes beyond doubt that the real merit of the filler and the place it takes in the automobile world is an available commodity for automobile owners of modest means who are compelled to economize in the operation and maintenance of their cars. The filler has found no other demand of substantial proportions.

The defendant insists that the filler is taxable under the terms of the revenue law quoted. The most perplexing problem presented for judicial action is the question of the assimilation of some unique and distinct product used in connection with articles and products specifically enumerated in taxing statutes. The defense in this case pertinently illustrates the difficulties. The defendant contends that the filler is an article as distinguished from material; if not so, it is argued, that in any event it is an inner tube. Next we are told that if it is not an inner tube it is a part within the meaning of subdivision (3) of the statute, and if unable to classify it as a part, it assuredly falls within the term "accessory." Finally the argument is urged upon us that notwithstanding the apparent inability to permanently classify the filler, it is nevertheless within the intent and purpose of the taxing acts.

In view of the record and the arguments advanced, it may not escape observation that the correct classification of the filler for taxation purposes is one of doubt, not only to the court but to the defendant as well. Congress, in imposing taxes upon the articles mentioned in section 900 of the revenue laws, was not dealing in obscure and involved trade terms. Tires, inner tubes, and accessories, when used in con-

Opinion of the Court

nection with motor vehicles, have a firmly established trade meaning. Parts and accessories, as said by this court in *Martin Rocking Fifth Wheel Co.* v. *United States*, 60 C. Cls. 466, 473, "are no longer as Greek to the average inhabitant." The purchaser of a motor vehicle is generally cognizant of what is included in the terms, and the dealer now assures his customer that the car is sold fully equipped.

In the case of *Gould* v. *Gould*, 245 U. S. 151, the Supreme Court said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

In *United States* v. *Merriam*, 263 U. S. 179, the court said:

"On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

In the case of *Atwater Kent Mfg. Co.* v. *United States*, decided by this court June 14, 1926, 62 C. Cls. 419, the Chief Justice said, in delivering the opinion of the court:

"The defendant argues that the timers and coils 'were parts when sold to make up the dealer's stock of parts; in fact, they were parts from the time they were manufactured to supply the well-known and ever-increasing demand for such parts.' But the question is not whether they were 'parts' of something after they were attached to the one or another kind of machine to which they were attached and in which they could function, but whether they were sold as parts of the articles mentioned in subdivisions (1) and (2) of section 900. * * * The context shows that the word 'parts' referred to in the acts was intended to have and should be given a restrictive meaning."

Beyond doubt the articles enumerated specifically in subdivision (3) of section 900 have no common meaning. Oth-

erwise it would have been unnecessary to so specify. In similar revenue legislation the same course is pursued by Congress, and articles subjected to taxation carefully enumerated specifically. Reference to an article by its fixed trade name was obviously not intended to reach another not so known or even so designated by the trade to which it is inseparably connected. In subdivision (4) of the act of 1918, pianos, player pianos, music boxes, etc., are taxed. Subdivision (6) taxes "chewing gum or substitutes therefor," the last a significant designation. Surely not every article used in connection with a motor vehicle was intended to be taxed by the statute here involved. If permitted to indulge in intense technicalities the plaintiffs' filler is not a tube; it is a solid substance, and the inner tubes from which it is made have all theretofore been taxed.

We are not inclined to the opinion that the possibility of use determines the classification. As a matter of established fact, the plaintiffs' filler finds its utilization a possibility subsequent to the partial and almost complete exhaustion of the tire mentioned in the act. The filler is not sold when the tire is capable of functioning as tires are designed to function. The filler takes its place in the last stages of the tire's utility; it is in its nature more of a makeshift, a last resort, a final available adjunct to a demoralized tire by which the tire's life may be extended, and when the tire finally gives way the filler itself becomes useless. Therefore, it seems to us that taxing a product of this sort is not within the meaning or may by implication be construed to be within the meaning of the statute. The record discloses that the filler and similar products serving a similar purpose were well known to the automobile industry for many years preceding the passage of the revenue acts. It had been extensively advertised and was a well-known commercial product under its trade name of "Rubber Filler." There was no difficulty in identifying the product by name. The process and the substance were not new in 1918. Congress did not mention it in the statutes, and the doubt as to inclusion therein is made evident by the course of this proceeding.

Judgment for the plaintiffs for $24,932.98. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

WABASH VALLEY PACKING CO. v. THE UNITED STATES

[No. E-10. Decided April 4, 1927]

On the Proofs

Contract; purchase by sample; deliveries in accordance with sample.—Where in a contract for the purchase of canned goods it is provided that no article will be accepted by the Quartermaster Corps which is objectionable under the pure food laws, and that "deliveries must be equal to accepted samples or prescribed standards," the purchasing officer to make the determination in each case, and there is no proof that the articles delivered conflicted with the pure food laws or regulations thereunder, or that they were not equal to the samples accepted, and no standard was otherwise established by which deliveries could be governed, the contractor is entitled to the full purchase price.

The Reporter's statement of the case:

Mr. Wilfred Hearn for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Wabash Valley Packing Co., is a corporation organized and existing under the laws of the State of Illinois.

II. On or about the first day of November, 1918, the plaintiff received from the defendant, through the St. Louis depot quartermaster of the War Department, a circular proposal No. 277 requesting bids for subsistence stores, including an item of 204,908 cans of lye hominy. The said circular proposal contained the following among other provisions:

"Specifications and Conditions: Provisions of Q. M. C. Form No. 120, February, 1918, with such amendments as

may be noted hereafter, will govern. Serial numbers indicated in attached list refer to serial numbers Q. M. C. Form No. 120."

The said Q. M. C. Form 120 contained among others the following provisions:

"Supplies purchased by the Quartermaster Corps are subject to interstate shipment, and the attention of all bidders is invited to the requirements of 'An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious food, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,' * * *. Attention is also invited * * * to the decisions of the Board of Food and Drug Inspection, issued from time to time by the United States Department of Agriculture. * * *

"No article will be purchased by the Quartermaster Corps which is objectionable under the above laws.

"Deliveries must be equal to accepted samples or prescribed standards, and the purchasing officer shall make the determination in each case."

Under date of May 27, 1912, food inspection decision No. 144 was promulgated by the Department of Agriculture, as follows:

"The can in canned food products serves not only as a container but also as an index of the quantity of food therein. It should be as full of food as is practicable for packing and processing without injuring the quality or appearance of the contents * * *. Canned foods, therefore, will be deemed to be adulterated if they are found to contain water, brine, syrup, sauce, or similar substances in excess of the amount necessary for their proper preparation and sterilization."

Prior to November 18, 1918, the plaintiff submitted to the depot quartermaster of the War Department at St. Louis, Mo., a written proposal to furnish the said quantity of lye hominy at the price of $0.08 per can. A copy of said circular proposal No. 277, together with plaintiff's proposal, is attached to plaintiff's petition herein marked "Exhibit A" and is by reference made a part of this finding.

III. Sample cans of the hominy plaintiff proposed to furnish were submitted to the defendant by plaintiff in accordance with the requirements set forth in circular proposal No. 277.

IV. Under date of November 22, 1918, the defendant, through the depot quartermaster of the War Department at St. Louis, Mo., pursuant to the said written proposal of the plaintiff, issued to the plaintiff purchase orders Nos. S-756 to S-760, inclusive.

A copy of purchase order No. S-760 is attached to plaintiff's petition herein marked "Exhibit B" and is by reference made a part of this finding. All of the said purchase orders are identical in all respects with the exception of those provisions relating to quantities and places of shipment.

Item No. 233, Q. M. C. Form No. 120, of February 15, 1918, referred to in each of said purchase orders, is as follows:

"Hominy, lye: No. 3 cans, 24 to case, liquor to be clear, hominy to be well cleaned and free from black spots."

V. On January 20, 1919, the plaintiff shipped 24,000 cans of lye hominy of the invoice value of $1,920 to the zone supply officer of the defendant at St. Louis, Mo., in fulfillment of purchase order No. S-756; on January 21, 1919, 18,140 cans of the invoice value of $1,451.20 to the zone supply officer of the defendant at Chicago, Ill., in fulfillment of purchase order No. S-757; and on January 29, 1919, 24,000 cans of the invoice value of $1,920 to the zone supply officer of the defendant at El Paso, Tex., in fulfillment of purchase order No. S-758. These three shipments were received, accepted, and paid for by the defendant according to the terms of the invoices and the purchase orders.

VI. On January 30, 1919, the plaintiff shipped 24,000 cans of lye hominy of the invoice value of $1,920 in car designated as C., C., C. & St. L. No. 84691, and on February 6, 1919, 27,600 cans of the invoice value of $2,208 in car designated as L. S. & M. S. 144273, and on March 21, 1919, 12,048 cans of the invoice value of $963.84 in car designated as Sou. 269214 to the zone supply officer of the defendant at New Orleans, La., in fulfillment of purchase order No. S-759. The shipments of January 30, 1919, and February 6, 1919, were received, accepted, and paid for by the defendant in accordance with the terms of the invoices and the purchase order.

VII. On February 11, 1919, the plaintiff shipped 24,000 cans of lye hominy of the invoice value of $1,920 in car des-

ignated as N. Y. C. 139358, and on February 12, 1919, 19,392 cans of the invoice value of $1,551.36 in car designated as N. Y. C. 138453, to the zone supply officer of the defendant at Fort Sam Houston, Tex., in fulfillment of purchase order No. S-760.

VIII. On March 6, 1919, the zone supply officer at Fort Sam Houston reported by wire to the Director of Purchase and Storage at Washington, D. C., the solid and liquid contents of the 43,392 cans of lye hominy received in cars N. Y. C. 139358 and N. Y. C. 138453, and on the same day the said zone supply officer was instructed to reject the two cars of lye hominy because of slack fill and excess liquid. The plaintiff was, on March 24, 1919, notified accordingly.

After the plaintiff was notified that shipments made to Fort Sam Houston would be rejected, the plaintiff, on March 26, 1919, wrote to the zone supply officer at St. Louis, in part, as follows, with reference to the Fort Sam Houston shipments:

"We are willing to allow whatever reduction is necessary to cover this shortage, but to have these cans rejected will mean absolute bankruptcy to us. * * * We earnestly solicit you to make some adjustment of this that will not ruin us."

The plaintiff was notified by the defendant on April 5, 1919, and again on April 21, 1919, that car No. 84691, C., C., C. & St. L., shipped to New Orleans, although this car had previously been received, accepted, and paid for by the defendant, and cars N. Y. C. 138463 and N. Y. C. 139358, shipped to Fort Sam Houston, would be rejected unless the plaintiff would accept a deduction of 13.4 per cent, 14.1 per cent, and 18.4 per cent, respectively, on its invoices covering those three shipments. The plaintiff wrote to the zone supply officer at St. Louis, Mo., on May 8, 1919, protesting against the deductions being made, but stating that on account of its financial condition it would be forced to accept the defendant's terms if better terms could not be had from the defendant.

IX. The Quartermaster General caused samples to be secured from all of the shipments of lye hominy previously made to the several zone supply depots. An examination of

from 6 to 27 cans of lye hominy in each of said shipments was made by a captain, Quartermaster Corps, United States Army, a former chemist in the Department of Agriculture for a few years. The captain at the time had had no experience as to the adulteration of canned lye hominy, and after conducting experiments fixed upon 22 ounces of hominy as the proper standard of solids in a can No. 3 in size. The standard so fixed was obtained from a book, and the captain, prior to fixing the same, sought the opinion and collaboration of others in the department. The Quartermaster General's office accepted this standard. The depot quartermaster at St. Louis, from whose office the purchase order issued, made no complaint about the plaintiff's hominy and rejected none. From said examination as aforesaid the Quartermaster General determined that the said shipments contained less than 22 ounces drained weight per can to the following extent: St. Louis shipment, purchase order No. S–756, 23,-995 cans, 7 per cent; Chicago shipment, purchase order No. S–757, 18,140 cans, 8.2 per cent; El Paso shipment, purchase order No. S–758, 24,000 cans, 11.2 per cent; New Orleans shipments, purchase order No. S–759, 23,976 cans 13.4 per cent, 27,572 cans 14.2 per cent, 12,048 cans 5.2 per cent; Fort Sam Houston shipments, purchase order No. S–760, 23,934 cans 18.4 per cent, 19,111 cans 14.1 per cent.

On June 14, 1919, the Quartermaster General ordered that deductions be made from the purchase prices of the various shipments in accordance with the shortages determined upon. These deductions amounted to $1,667.67, and were charged against the plaintiff and deducted in making payments for the shipment of March 21, 1919, to New Orleans, and the shipments of February 11 and February 12 to Fort Sam Houston.

X. When the final payment of $2,763.57 was made by the defendant to the plaintiff, the plaintiff signed the vouchers under protest in the manner and form prescribed by the defendant.

XI. There is no evidence to show that the lye hominy delivered to the defendant by the plaintiff, pursuant to the said proposal and the purchase orders, was not in all respects equivalent to the samples submitted by the plaintiff to the defendant at the time said proposal was made.

Opinion of the Court

The court decided that plaintiff was entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff is an Illinois corporation, engaged in the canning business at Mount Carmel, Ill. On November 1, 1918, the St. Louis depot quartermaster of the Army forwarded to the plaintiff a circular proposal requesting bids for, among other subsistence stores, 204,908 cans of lye hominy. The circular contained specific reference to the national pure food law and a warning to the plaintiff that "no article will be purchased by the Quartermaster Corps which is objectionable under the above laws." It also set forth the vitally important stipulation that "deliveries must be equal to accepted samples or prescribed standards, and the purchasing officer shall make the determination in each case." The plaintiff returned to the depot quartermaster its bid of 8 cents per can, accompanying the same with sample cans of hominy it proposed to furnish, in accord with the proposal. Presumably the depot quartermaster, the purchasing officer, was satisfied with the offer and the samples, for the bid of the plaintiff was accepted. On November 22, 1918, the depot quartermaster issued and forwarded to the plaintiff purchase orders numbered consecutively from S–756 to S–760, inclusive. Upon the face of each of the said orders was a reference to "Item No. 233, Q. M. C. Form No. 120, of February 15, 1918." The order so referred to reads as follows: "Hominy, lye: No. 3 cans, 24 to case, liquor to be clear, hominy to be well cleaned and free from black spots."

The plaintiff on January 20, 1919, shipped 24,000 cans of the value of $1,920 to the zone supply officer at St. Louis. This shipment supplied the full quantity requisite under purchase order No. S–756. The shipment was received, accepted, and paid for.

On January 21, 1919, the plaintiff supplied the quantity required under purchase order No. S–757 by shipping to Chicago, Ill., 18,140 cans of the value of $1,451.20, the entire consignment being received, accepted, and paid for. On January 29, 1919, the plaintiff, under purchase order No. S–758, shipped 24,000 cans to El Paso, Tex., and it was received, accepted, and paid for. On January 30, 1919, and afterwards, on February 6, 1919, the plaintiff consigned a total of

51,600 cans to New Orleans, and these, like former shipments, were received, accepted, and paid for. Up to and including the last date the plaintiff had shipped 117,740 cans and received without complaint or protest from the Government officers, in payment therefor, the total sum of $9,419.20. On February 11 and 12, 1919, the plaintiff shipped 43,392 cans to Fort Sam Houston, Tex., and on March 21, 1919, shipped 12,048 cans to New Orleans. The zone supply officer at Fort Sam Houston, on March 6, 1919, wired the Director of Purchase and Storage at Washington the solid and liquid contents of the 43,392 cans received at the fort. The Washington office immediately notified the officer to reject the shipments, and on March 24, 1919, notified the plaintiff accordingly.

Following the receipt of this alleged accurate information and the peremptory order of rejection, the receipt of the information and rejection having taken place on the same day, the Quartermaster General inaugurated an investigation. From 6 to 27 cans of hominy were secured from each shipment made, forwarded to Washington, and there submitted for examination and analysis to a captain in the Quartermaster Corps. The captain had not theretofore acquired expert knowledge as to the solid content of a No. 3 can of hominy, nor did he subsequently determine the minimum requirement until after he obtained through submission to and collaboration with several other officers that 22 ounces was the very least the hominy should weigh, exclusive of fluid content. No regulation of the pure-food department had ever so provided, and the fixing of the standard was accomplished exclusively as narrated. The department unhesitatingly adopted the standard, and in pursuance thereof proceeded to make deductions from the plaintiff's contract price for the hominy upon the following basis: Relying upon the alleged shortage in the solid contents of from 6 to 27 cans out of 24,000 shipped to St. Louis, and fixing the same at 7 per cent per annum of the gross receipts, viz, 23,995 cans, a deduction of 7 per cent from the purchase price was made. This same course with varying rates of percentage was followed as to all the remaining shipments,

resulting in withholding from the plaintiff $1,667.67 of the total amount due him.

The plaintiff, in dire financial straits, agreed to settle the shipment rejected under purchase order No. S-560 for $583.92 less than the invoice price, thus making the final claim for which this suit was commenced total $1,073.40.

This case is to be determined by the provisions of the contract under which the sales were made. Obviously there is no stipulation in any paper making up the agreement fixing the quantity of hominy in each can. The defendant deduces a conclusion in justification of the deduction made, predicated upon an alleged violation and departure from the pure food law by the plaintiff. It was generous of the defendant to recite provisions of the pure food law in the proposal; but manifestly a proceeding wholly unnecessary. The pure food law is a law of the land, and it is hardly to be supposed that a corporation solely engaged in the canning industry was ignorant of its provisions; even so, the familiar presumption of knowledge of the law obtains. The plaintiff could not escape the consequences of its violation though not made a part of the contract. The law was passed to protect all citizens of the country and not for the special benefit of the defendant. Giving to the terms of the contract in this respect their widest latitude, what are the consequences? "No article," it is said, "will be purchased by the Quartermaster Corps which is objectionable under the above laws." Who is to determine the fact of objectionableness? Surely no jurisdiction is conferred upon the Quartermaster General to determine the issue. The enforcement of the pure food law is committed to other sources. The edict of the Quartermaster's Department is not sufficient alone to convict one of a violation of the law. The court has a fixed opinion that the guilt or innocence of one charged with a violation of law is a judicial question.

If, however, the contract is to be construed as an obligation of the plaintiff to furnish an article of food which meets the requirements of the pure food law, there is no fact of record in the case which would warrant a conclusion that this was not done. Whatever else may be said, it is evident beyond disputation that the hominy delivered was not unfit

for human consumption. The defendant retained it and presumably has consumed it. At any rate, it was not returned to the plaintiff and no offer to do so made. No regulation or ruling of the Department of Agriculture has been cited on the subject of adulteration of canned hominy, except decision No. 144, wherein canned goods are to be deemed as adulterated containing brine, sirup, water, etc., in excess of the amount for their preparation and sterilization. The only decision as to deleterious excess of fluids over hominy promulgated in this case emanates from the purchaser of the hominy, and this same purchaser keeps the hominy as a desired article of food.

Aside from all this, however, is the controlling stipulation of the contract, "deliveries must be equal to accepted samples or prescribed standards, and the purchasing officer shall make the determination in each case." The findings show that the plaintiff submitted samples. They were accepted by the defendant, the hominy was purchased after their inspection, and the hominy delivered, so far as the record discloses, was the equal of the samples furnished. The purchasing officer at no time prescribed "standards" otherwise than in accord with the sample. The plaintiff was not advised as to "standards" until after nearly 118,000 cans had been delivered, accepted without question, and paid for. The only specification which confronted the plaintiff is found in "Item No. 223, Q. M. C. Form No. 120, of February 15, 1918. * * * Hominy, lye: No. 3 cans, 24 to case, liquor to be clear, hominy to be well cleaned and free from black spots." Not a can was rejected for failure to meet them.

We are not impressed with a contention that 204,908 cans of lye hominy may be considered as adulterated because in instances the percentage of solid and liquid content varies; nor are we convinced as to the correctness of the standard established by the purchaser, a standard of which the plaintiff was not advised, and more or less arbitrary in its ascertainment.

We believe the plaintiff entitled to judgment. The defendant accepted the hominy, still has what has not been consumed, and has arbitrarily partially condemned a vast amount of consumable food supply without authority given

so to do in the contract of sale. Judgment for the plaintiff for $1,073.40. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

WHEELING MOLD & FOUNDRY CO. v. THE UNITED STATES

[No. F–379. Decided April 4, 1927]

On Demurrer to Petition

Contract; delays by Government as offset of delays by contractor; decision by contracting officer; damages.—Where a contract provides that in the assessment of liquidated damages for delay "the contractor shall receive credit for all delays which the contracting officer * * * may determine to have been due to action of the United States, and for such other delays as the same authority may decide to have been due to * * * unavoidable causes * * *; but none of the above causes shall constitute a basis for action against the United States for damages * * *," the contractor is bound by a decision of the contracting officer that it is not entitled to credit for certain delays claimed. The contract, so worded, *construed*, (1) as affording relief to the contractor only by way of credit against its own delays, and (2) as a bar to suit for damages for delays due either to the action of the United States or to unavoidable causes.

The Reporter's statement of the case:

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. Marland Gale, opposed. *Messrs. Fayette B. Dow* and *George W. Field* were on the brief.

The material averments of the petition are reviewed in the opinion.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff seeks to recover an amount assessed against it under a contract as liquidated damages for delay in com-

pleting the delivery of the materials called for by the contract. It is not seeking to recover a sum of money in the form of a loss for a breach of contract, but claims that under the contract the Government was required to offset, day for day, the days lost by the action of defendant and by unavoidable causes, by the days plaintiff delayed after the date fixed for the completion of the contract and for which liquidated damages were assessed.

The delay in completion is admitted, and the accuracy of the assessment of the liquidated damages is not questioned. It is contended that the plaintiff should not have been assessed for liquidated damages for delay, because it was itself delayed by the action of the defendant and by unavoidable causes for an equal number of days, and that therefore it is entitled to recover the amount assessed against and withheld from it for liquidated damages.

The claim is based upon that paragraph of the contract which, after providing for the assessment of liquidated damages for delay, reads in part as follows:

"In making settlements in which such charges are involved, the contractor shall receive credit for all delays which the contracting officer * * * may determine to have been due to action of the United States, and for such other delays as the same authority may decide to have been due to such unavoidable causes, including fires, unseasonably severe storms, and labor strikes in the works of the contractor, as occurred before the date upon which final delivery is due under the provisions of article 1, or before the expiration of the time thereafter for which credit is allowed under this article; and the date of final delivery shall be considered for the purpose of settlement as the date of actual final delivery less the delays for which credit has been allowed; but none of the above causes shall constitute a basis for action against the United States for damages * * *."

It will be seen that this paragraph provides, first, that in settlements for charges involving liquidated damages and expenses of inspection and superintendence incurred during the period for which liquidated damages are deducted the plaintiff shall receive credit for certain delays; second, that these latter delays shall be such as the contracting officer "may determine" to have been due to the action of the

United States or other "unavoidable causes, including fires, unseasonably severe storms, and labor strikes in the works of the contractor"; and, third, that except for the purposes of this credit for delays none of these causes "shall constitute a basis for action against the United States for damages." The plaintiff, therefore, is entitled only to credit for delays which the contracting officer "may determine" to be due for the reasons named. The averment of the petition shows that the contracting officer did pass upon the question and determine that the plaintiff was not entitled to a credit for the delays claimed.

It may be said that by this contract plaintiff put itself wholly in the hands of the Government, but that is not a matter for our consideration. If it did so place itself, it must abide the result. The tribunal which was empowered to determine whether it was entitled to a credit for these delays decided adversely to it. As we have had occasion to say before, it is not the province of the court to make contracts but to construe and enforce them as it finds them. The contracting officer determined against the plaintiff on the question of the counterdelays, and so the claim set up in the petition furnishes no ground for a recovery.

There is another phase of the case which is also conclusive. It is plain that the only relief which the contract intended to afford the plaintiff in case of delays, whether caused by the Government or by unavoidable causes, was a credit for these delays as against its own delays, to be determined by the contracting officer, and that it could not make the former delays "a basis for action against the United States for damages." That this is true, it is only necessary to note that the delays for which it was to receive credit are, first, those due to the action of the United States, and, second, such "other delays" as the contracting officer might decide to have been due to unavoidable causes, etc., occurring before the date of final delivery. It will be seen that delays due to "unavoidable causes" are delays "other" than those due to the action of the United States, and for these clearly no action against the United States could be maintained; so that to give the clause a reasonable meaning it must be held that the word

"causes" in the last part of the paragraph quoted refers to all the grounds of delay recited.

The plaintiff has failed to show a cause of action, and the demurrer should be sustained and the petition dismissed. It is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

CHARLES S. CHILD AND WILLIAM J. FULLERTON, FORMERLY PARTNERS DOING BUSINESS AS WILSON & BRADBURY, v. THE UNITED STATES

[No. D-561. Decided April 4, 1927]

On the Proofs

Excess-profits tax; accrual basis; deduction of tax payable in following year.—See *D'Olier* v. *United States*, 61 C. Cls. 895.

The Reporter's statement of the case:

Mr. Spencer Gordon for the plaintiffs. *Mr. J. Harry Covington* and *Covington, Burling & Rublee* were on the briefs.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

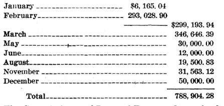
I. The plaintiffs, Charles S. Child and William J. Fullerton, are citizens of the United States and residents of the States of Pennsylvania and New Jersey, respectively, and during the year 1917 were partners doing business as commission merchants in the city of Philadelphia under the firm name of Wilson & Bradbury.

II. On June 15, 1918, the plaintiffs paid to the Bureau of Internal Revenue as excess-profits tax imposed upon the said partnership for the year 1917 the sum of $379,160.42. On April 15, 1921, the plaintiffs paid an additional amount

of excess-profits taxes for said year 1917 of $2,729.43. Subsequently there was refunded by the Bureau of Internal Revenue the sum of $10,297.26, said refund being allowed by reason of matters not involved in this suit. The balance, $371,592.59, has been retained by the United States as net excess-profits taxes due from plaintiffs as aforesaid for the year 1917 based on an invested capital as determined and found by the Commissioner of Internal Revenue of $1,775,-862.98. The computation of said excess-profits taxes as determined and found by the Commissioner of Internal Revenue is shown by Exhibit B filed with the plaintiffs' petition, which is made a part hereof by reference.

III. On December 31, 1916, the invested capital of said partnership was the sum of $2,151,634.54. The net income of said partnership for the calendar year 1917 was $995,-428.14, including dividends of $18,934.37 not subject to the excess-profits tax, leaving net income of said partnership for the calendar year 1917 subject to excess-profits tax of $976,493.77.

IV. During the year 1917 the partners withdrew from the funds used in the partnership business as follows:



January	$6, 165. 04	
February	293, 028. 90	
		$299, 193. 94
March		346, 646. 39
May		30, 000. 00
June		12, 000. 00
August		19, 500. 83
November		31, 563. 12
December		50, 000. 00
Total		788, 904. 28

V. The Commissioner of Internal Revenue determined and found under his interpretation of the provisions of the revenue act of October 3, 1917, and Regulations 41, article 43 and 53, promulgated by him, that certain withdrawals of the partners in the sum of $299,193.94 to March 1, 1917, and for the month of March, 1917, in the sum of $346,646.39, resulted in deductions of the invested capital of said partnership for the calendar year 1917 in the sum of $375,771.56, as shown by computation in said Exhibit B.

VI. Regulations 41, articles 43 and 53 read as follows:

"INVESTED CAPITAL—GENERAL PROVISIONS

"ART. 43. *How to ascertain average invested capital for the year, averaged monthly.*—The invested capital for any pre-war or taxable year (or where the tax is computed upon the basis of a period less than a year, for such period) is the average invested capital for the year or period averaged monthly, according to the following rules:

"(*a*) Add the capital for each of the several months during which no change occurs, and the average capital (ascertained as provided in subdivision (*b*) of this article) for each month in which a change occurs and divide the total by the number of months in the year or period.

"(*b*) To ascertain the capital for any month in which a change occurs multiply the capital as of the first day of the month by the number of days it remains constant and the capital after each change by the number of days (including the day on which the change occurs) during which it remains constant, add the products, and divide the sum by the number of days in the month.

"INVESTED CAPITAL—CORPORATIONS AND PARTNERSHIPS

"ART. 53. *Rule for computing invested capital.*—In computing invested capital, every corporation or partnership paying taxes at the graduated rates prescribed in section 201 (see art. 16), shall add together its paid-in capital and its paid-in or earned surplus and undivided profits (under whatever name the same may be called) as shown by its books at the beginning of the taxable year. The total thus obtained shall be adjusted for any asset or item which it covers that is not carried on the books at the valuation prescribed by law or by these regulations. When necessary, adjustment (addition or subtraction) shall be made in respect of the following:

"ADJUSTMENTS

"11. * * * If there has been any change made during the taxable year in the amount of the invested capital, the monthly average shall be taken (see art. 43), but in no case may the invested capital include any surplus or undivided profits earned during the taxable year."

VII. Said partnership was and is unable to state its earnings and expenses month by month for the calendar year 1917 and in determining its invested capital for said calendar

year 1917 the Commissioner of Internal Revenue deducted from the invested capital of $2,151,634.54 existing on December 31, 1916, said sum of $375,771.56, said deduction being computed by reducing said invested capital as of March 1, 1917, and April 1, 1917, to the extent that the withdrawals of funds used in the partnership set forth in paragraph 5 hereof were in excess of the prorated net earnings of the partnership to said dates, respectively, said net prorated earnings being based on the proportionate part of the total net earnings for the year 1917 averaged monthly, reduced, however, by such proportionate part of the total excess-profits tax for the year 1917, averaged monthly, as the period to the dates of the respective withdrawals bore to the whole year, all as set forth in detail in said Exhibit B.

VIII. If the invested capital of the partnership for the calendar year 1917 is to be the sum of $2,151,634.54, then the excess-profits tax of the partnership for the year 1917 is the sum of $326,500.10, the computation of which is shown by Exhibit A filed with the plaintiffs' petition and made part hereof by reference.

IX. If the invested capital of said partnership for the calender year 1917 is to be the sum of $1,842,789.63, then the excess-profits tax of said partnership for the year 1917 is the sum of $363,561.51, the computation of which is shown by Exhibit C filed with plaintiffs' petition and made part hereof by reference.

X. On or about December 14, 1922, plaintiffs filed a claim for refund of $55,389.75 with the collector of internal revenue at Philadelphia, Pa. Said claim related to the same matters as those contained in this suit and to certain other matters not material herein. The part of said claim for refund relating to matters not involved in this suit was allowed by the Commissioner of Internal Revenue, and the remaining part of said claim for refund—that is the part relating to the controversy embodied in this suit—was disallowed on April 17, 1923. No part of the disputed sum of $45,092.61 has ever been repaid to plaintiffs.

XI. Said partnership during the year 1917 kept its books of account and reported its income for Federal taxation purposes on the accrual basis of accounting as distinguished

from the cash receipts and disbursements basis of accounting; that is to say, said partnership accrued on its books as income and earnings for the year 1917 all credits and accounts receivable for that year, such as bills receivable, accounts receivable, etc., whether actually received in cash in that year or subsequent years, and likewise all accounts payable and charges against income, such as materials purchased, expenses incurred, etc., save and except excess-profits taxes for the year 1917, were accrued on the books of said partnership as ordinary and necessary business expenses applicable to the year 1917, whether actually paid in the year 1917 or subsequent years, and were taken as deductions in the Federal income-tax return for the year 1917. Copies of said partnership's original and amended income and excess-profits tax returns for the calendar year 1917 are filed herein as a report of the Treasury Department.

The partnership carried an inventory in its balance sheets and the values used in this inventory affected the partnership income for the year 1917.

Excess-profits taxes, however, for the year 1917 were not so accrued on the books of said partnership as an account payable or charge against accrued income for the year 1917, and no entries were made on the books of said partnership during or as of dates in 1917 indicating that excess-profits taxes for the year 1917 had become due, nor did the said partnership establish during the year 1917 a reserve for such excess-profits taxes. Said excess-profits taxes for the year 1917 were actually paid by the partnership in June, 1918.

All of the excess-profits taxes paid by the plaintiffs were received by the United States and were paid into the United States Treasury, and after the refunds described herein had been paid, the United States has retained and still retains in its Treasury the sum of $371,592.59 of said excess-profits taxes, no part of which has been repaid to plaintiffs.

The court decided that plaintiffs were not entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiffs against the United States to recover certain excess-profits taxes for the calendar

Opinion of the Court

year 1917, alleged to have been erroneously assessed against and collected under protest from the partnership of Wilson & Bradbury.

The facts are agreed to by the parties, and are set out in the findings of fact made by the court. The plaintiffs, formerly partners doing business under the firm name of Wilson & Bradbury, paid net excess-profits taxes assessed against the partnership for the calendar year 1917 in the sum of $371,592.59, based on an invested capital determined and found by the Commissioner of Internal Revenue to be $1,775,862.98.

On December 31, 1916, the invested capital of the partnership was $2,151,634.54, and its net income for the calendar year 1917 subject to excess-profits taxes was $976,493.77. How much of the net income of the said partnership for the year 1917 was earned in any given month can not be stated, but it is shown that during the first three months of 1917 plaintiffs withdrew from the partnership's funds the sum of $645,840.33, of which $299,193.94 was withdrawn prior to March 1, 1917, and $346,645.39 during the said month of March, and that the total withdrawals by the partners for the year 1917 amounted to the sum of $778,904.28.

It is also shown that plaintiffs' books for the calendar year 1917 were kept on the accrual basis of accounting both as to debits and credits as distinguished from the cash receipts and disbursements basis of accounting.

The Commissioner of Internal Revenue, under the provisions of section 207 of the revenue act of October 3, 1917, and regulations 41, articles 43 and 53, in determining the amount of invested capital used and employed in the partnership business during the year 1917, made certain deductions from the partnership invested capital of $2,151,634.54 existing at the beginning of the taxable year 1917. These deductions and the method of their ascertainment are set forth in the findings of fact, the amount on which the tax was based having been ascertained to be the sum of $1,775,862.98.

This court had before it in the case of *Franklin D'Olier et al.* v. *United States*, 61 C. Cls. 895, the same questions

Syllabus

which are presented in this case. In the *D'Olier case* this court held as follows:

"Where a partnership in 1918 makes a return of its excess-profits tax for the year 1917 on an accrual basis, and during the year 1917 withdraws certain amounts from its invested capital, the Commissioner of Internal Revenue is authorized, for the purpose of computing the tax, to reduce the invested capital shown in said return for 1917 by deducting, as of the dates of withdrawal, that part of the excess-profits tax for the taxable year estimated to have accrued at that date, although such tax was not assessed and did not become due and payable until a year after the withdrawal."

The plaintiffs in their brief ask us to reexamine the question decided by us in the *D'Olier case*. This we have done, and we find no reason to change our conclusion, especially as in that case an application was made for a certiorari to the Supreme Court of the United States, and that application was denied.

We are of opinion that the petition of the plaintiffs must be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

WILLIAM ROSENBLATT v. THE UNITED STATES

[No. E-206. Decided April 4, 1927]

On the Proofs

Sale of supplies; inspection; cancellation of award; forfeiture of deposit.—In a proposal and bid for Navy surplus scrap metal it was stated that the material was offered "as and if is," that bidders were expected to inspect the material before bidding, and that deposits would be forfeited upon failure to carry out the terms of payment. Plaintiff inspected the lot offered for sale, bid accordingly, was announced as the highest bidder, and made the required deposit. He at one reinspected the lot and found it materially changed. He protested against being required to take the lot so changed, and before a formal award was made it was announced as canceled and return of the deposit was declared forfeited and was retained. *Held*, that the contract of sale was not completed, and the defendant, having suffered no loss, may not under the circumstances retain the deposit.

Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. Lawrence A. Steinhardt for the plaintiff. *Guggenheimer, Untermyer & Marshall* were on the briefs.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is and at all the times hereinafter mentioned was a native-born citizen of the United States of America, residing at 4 East 88th Street, Borough of Manhattan, city, county, and State of New York, and engaged in the business of a metal broker and in the purchase and sale of metals at 165 Broadway, Borough of Manhattan, city, county, and State of New York.

II. The officer in charge of the central sales office, navy yard, Washington, D. C., approximately two or three weeks prior to the day fixed for the sale on June 8, 1923, mailed to prospective bidders Catalogue No. 206–B, entitled "Sale of Navy Surplus Scrap, Scrap Metal," inviting the submission of sealed proposals for the purchase of any one or more of the lots of material specified in that catalogue, consisting in all of approximately 7,581,500 pounds of material. The terms of the sale were set out on pages 6 and 7 of the catalogue. The pertinent parts thereof are as follows: * * *

"3. Material is offered 'as and if is' without recourse and the description furnished is based on the best available information, but no guaranty is given by the Navy as to the exact quantity, quality, condition, weight, size, or description. In the event that the entire quantity listed and paid for under an individual lot is not available at time of shipment the amount involved in the shortage will be refunded.

"4. Full opportunity for actual inspection of the material listed is offered and bidders are expected to make physical inspection of the material desired before submitting bids. Failure to inspect will not constitute grounds for claim for adjustment.

"5. Stock numbers where given in the catalogue are for the information and convenience of the naval authorities only, and are not intended as a part of the description for the information of the bidders.

"6. A deposit of 10 per cent of the total amount bid, in the form of cash, certified check, cashier's check, or postal

money order, made payable to the Officer in Charge, Central Sales Office, Navy Yard, Washington, D. C., must accompany the bids. Bids less than $250 must be accompanied by the full amount of bid.

"7. Deposits of unsuccessful bidders will be returned promptly. Deposits of successful bidders will be held as security for the payment of balance of the purchase price within ten (10) days and removal of material within thirty (30) days from date of award. Where these terms are complied with deposits will be applied on final payment. In case of failure to carry out the terms of payment the 10 per cent deposit will be forfeited to the United States Government as liquidated damages, and the bidder shall lose all right and interest in the property."

"9. Balance due on awards must be effected within ten (10) days from date of award. Final settlement of balance due on purchases amounting to less than $5,000 must be made in the form of cash, certified check, or cashier's check. Final settlement of balance due on purchases of $5,000 or more may be made in the form of cash, certified check, cashier's check, banker's acceptance, or by an approved, clean, nonrevocable domestic letter of credit on a bank which is a member of the Federal Reserve Banking System. The banker's acceptance of drafts drawn by virtue of letter of credit issued in final settlement of purchases must be due and payable as follows:

"Purchases of from $5,000 to $10,000, 30 days.

"Purchases of from $10,000 to $25,000, 30 and 60 days.

"Purchases over $25,000, 30, 60, and 90 days from date of award.

"10. Upon payment of the purchase price in full, title to the material passes to the purchaser and all handling thereafter shall be at the risk of the purchaser."

"14. The right is reserved to reject any or all bids and to award less than the quantity desired by the bidder, to waive defects in bids, to withdraw whole lots or any portion thereof as may be deemed advantageous to the Navy. Only bids actually physically received at the appointed place at the appointed time will be considered. Bids sent by mail must be actually physically received at the appointed place by the appointed time in order to be considered."

"16. Having carefully examined and considered the foregoing 'terms of sale,' I/we hereby offer the price set opposite the lots desired and specifically waive any claim for adjustment on account of not having inspected the material. This bid is accompanied by a deposit of $———."

A copy of said catalogue was sent the plaintiff.

Reporter's Statement of the Case

III. Among the lot numbers offered for sale in said catalogue there appeared the following: Lot No. 28—Dross metal and skimming, red brass, class NF 21, quantity 201,000 pounds (more or less) located at Navy Yard, Washington, D. C.

IV. The plaintiff personally inspected said lot No. 28 three or four days prior to the day of sale and took four or five samples from various parts of said lot. Prior to the date of sale he submitted the said samples to the Pittsburgh Testing Laboratory and received from said laboratory a certificate showing said samples to contain red brass with copper content of 88.58%. In accordance with the terms of said proposed sale the plaintiff in due course regularly submitted a bid of $.0813 per pound for said lot No. 28; and in accordance with the terms of said sale he deposited with the central sales office of the Navy Department 10% of the amount of his bid, to wit, the sum of $1,634.13.

V. The plaintiff's bid of $.0813 per pound was submitted by him in reliance upon the catalogue received by him from said central sales office and his personal inspection of said lot No. 28 as it existed three or four days prior to the sale.

VI. Captain Edmund W. Bonnaffon was the officer in charge of the sale on June 8, 1923. The plaintiff's bid was received on June 8, 1923, in the morning, and on that day the bids were opened and the plaintiff was announced as the highest bidder on lot No. 28. The sales book in the office of the central sales office shows this fact, and around the price submitted by the plaintiff was drawn a circle in lead pencil, and in the record book of sales below the proffered price of plaintiff, viz, $.0813, there appears a notation made June 8, 1923, the day of sale, as follows: "Forfeit 10% dep." Immediately following the announcement that plaintiff was the highest bidder, plaintiff visited the dump of material he had previously examined and again inspected it. Plaintiff found on this inspection that the lot exhibited a changed condition and, upon close inspection, observed a quantity of dirt, slag, zinc, bronze, aluminum, and yellow brass, as well as some red brass. The plaintiff at once reported his discovery to the officer in charge, and he in turn delegated Mr. McKinney to accompany the plaintiff and make a further inspection of the

Reporter's Statement of the Case

lot. This inspection was made and Mr. McKinney admitted that the lot contained dirt, aluminum, bronze, and zinc in the mass, but that it was representative of the offal of the furnace process in the manufacture of red brass. Mr. McKinney further said that the lot would not run to exceed 45 or 50%.

VII. Mr. McKinney made the original inspection of lot No. 28 from 40 to 60 days prior to the date of sale for classifying the lot, and classified it as appears in the catalogue Mr. McKinney accounted for the presence of zinc, aluminum, etc., as accidental or incidental, and admitted that his second inspection convinced him that the lot was not uniform and that the plaintiff bid much more than the lot was worth. On June 22, 1923, Captain Bonnaffon wrote plaintiff a letter in which, among other words, this language appears: "Mr. McKinney, metallurgist of the gun factory, while he admitted, and his statement was accepted by this office as authoritative, that this was a mixed lot, yet there was red brass in this material, and therefore is not open to the objection raised by your attorney." The "mixed lot" referred to is lot No. 28, involved in this suit. A mixed lot is not a lot of "dross metal skimmings, red brass." On the contrary, as the inspection disclosed, it was, as the words import, a mixed lot of offal from various sources.

VIII. After this the plaintiff protested against being required to take lot No. 28. Captain Bonnaffon was of the opinion that inasmuch as lot No. 28 contained some red brass, the lot met the classification given in the catalogue, and was not disposed for that reason to grant plaintiff's protest without a forfeiture of plaintiff's deposit. He treated plaintiff's attitude as a refusal to carry out the contract of sale, and immediately on the day of sale did what he regarded as his duty and forfeited the plaintiff's deposit of $1,634.13, at the time in effect setting aside the bid, but doing so only upon the condition of retaining the plaintiff's said deposit. On June 12, 1923, two days after the expiration of the period within which plaintiff was to have made payment of the balance of the purchase price for lot No. 28, Captain Bonnaffon advised the plaintiff, in writing, "Award of lot #28 has been canceled." No written notice was ever served

Opinion of the Court

upon the plaintiff awarding the contract of sale to him. No demand for payment of the purchase price was ever made upon the plaintiff, no steps ever taken to work a forfeiture of plaintiff's deposit after the lapse of 10 days from date of sale, and no complaint made with respect to plaintiff's position except his claim for a refund of his deposit. It was the practice of the central sales office to send to successful bidders written notices of awards of contracts.

IX. Neither Captain Bonnaffon nor Mr. McKinney knew of their own knowledge whether there had been any additions to or removals from lot No. 28 between the date of classification and the date of the plaintiff's first inspection—three or four days prior to the sale.

There was a gross divergence between the description of lot No. 28 in the catalogue and the contents of the lot on the date of the sale.

The court decided that plaintiff was entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

The Navy Department, in the public sale of certain surplus war materials, catalogued the material to be sold, and upon this bids were solicited. Among other lots was lot No. 28, specified as "dross metal and skimmings, red brass, class NF 21, quantity 201,000 pounds (more or less), located at navy yard, Washington, D. C." It is conceded that "dross metal and skimmings, red brass," means the skimmings which follow the smelting of red brass in a smelting furnace. The value of the red brass refuse is in the ability to reclaim from it the metal it contains. The catalogue contained the usual governmental terms of sale; the material was to be sold "as and if is," opportunity for inspection was to be afforded, and no warranty obtained. The plaintiff made an inspection of the mound of material, and from it obtained samples which were in turn submitted by him to the Pittsburgh Testing Laboratory. The test disclosed a copper content of 88.58%. The plaintiff on the day of sale bid on the material, offering therefor $0.813 per pound, and accompanied his bid with a deposit of 10% of the same, i. e., $1,634.13. The sales officer announced on the day of sale that plaintiff's bid was the highest received. Immediately after this announcement

Opinion of the Court

plaintiff again inspected the material and discovered a radical change in conditions from those of his first inspection. He observed a large quantity of dirt, slag, zinc, bronze, aluminum, and yellow brass, as well as some red brass mixed in the make-up of the mound. Obviously this condition of affairs did not correspond to plaintiff's conception of what he intended to purchase, and he thereupon reported the fact to the officer in charge of the sales and requested a concellation of his contract, protesting against existing conditions. The officer in charge granted the request but declined to return to plaintiff the $1,634.13 he had deposited at the time he submitted his bid. It is for this amount the plaintiff sues.

The defendant treats the case as one of consummated contract, with the right of forfeiture under the agreement. The antithesis of the advanced proposition impresses the court. Section 14 of the terms of sale reserved to the defendant the right to reject any or all bids and the privilege of withdrawing whole lots from the sale, as well as waiving defects in bids offered. Careful stipulations abound throughout the entire recital of terms of sale advantageous to the Government, indicating a clear intent to reserve the question of a binding contract of sale until the award is made. "Award" is the term employed, clearly indicating that something more than the mere offer and announcement of the highest bidder were necessary to make the contract a binding obligation. If the defendant accepted the offer and the minds of the parties met, the contract would have been complete, but in this instance the defendant had not accepted and did not unqualifiedly accept the offer; on the contrary, between the announcement of the plaintiff's bid and the closing of the transaction the defendant, confronted by an allegation of changed conditions, acknowledged the same and sought to accept not an unqualified contract of sale but undertook to impose upon the plaintiff a condition for according him an alleged release from the existing difficulties of the situation. We say this advisedly because the record discloses that no effort was made to collect payment for the material alleged to have been sold, no notice was given to plaintiff to pay or remove the material from the premises, no word

Opinion of the Court

that the plaintiff was in default under his contract, nothing done except to hold fast to the material and the plaintiff's deposit. The Government's officer had notified the plaintiff in writing of awards as to two other distinct lots of material purchased by the plaintiff, but omitted any reference to lot No. 28. What the officer did was to say to the plaintiff, "We do not intend to hold you for the full purchase price of the material sold, and in consideration for this concession will forfeit your deposit." The officer's motives are not to be questioned; he was acting as he thought the law required him to act, not as he personally would have preferred to act.

The forfeiture provisions of the terms of sale are found in paragraphs 6 and 7 of the published catalogue. A deposit of 10% of the amount of the bid must accompany the same. Unsuccessful bidders were to receive a return of their deposits; but the deposit of the successful bidder was to be retained as security for his performance of the contract, and if he did not pay the balance of the purchase price within 10 days and remove the material within 30 days from date of sale the deposit was to be forfeited to the United States as liquidated damages and the bidder would lose all right and interest in the property. Forfeitures are not favored in the law. There is no evidence of any pecuniary loss to the United States, and obviously, from the record in this case the conditions of the terms of sale which were to work a forfeiture were not observed by the Government. On the contrary, the record book shows that on June 8, 1923, the officer in charge of the sale, on the very day of sale, without waiting longer, made this notation, "Forfeit 10% dep.," and then on June 12, 1923, advised the plaintiff by letter "that in accordance with your verbal request, the award of lot No. 28 (totaling $16,341.30) has been canceled." Note the language "*has been canceled*." It would be most unusual to sustain a forfeiture under a contract which prior to the time of the performance of the conditions which work the same had been "*canceled*."

It is impossible to read the record in this case and arrive at a conclusion that the contract of sale was completed. To attain such a conclusion entails the necessity of disregarding

the customary and usual practice of the Government in sales conducted as this one was conducted. To at once assume the right of forfeiting his advance deposit without waiting for a default upon the part of a purchaser, despite what may have been said, is indicative of an intent to treat as breached a contract which the officer later admits was canceled days before it was possible to make default. The sales officer was clothed with authority to accept or reject the plaintiff's bid. If accepted, the transaction from this angle of approach was closed; if rejected, a similar condition obtained. That he did not regard the plaintiff as obligated under the bid is manifest from his negotiations with the plaintiff respecting the sale after the bids were opened, and what he did is not unusual in Government sales of surplus material.

No proof, as previously observed, is in the record that the Government suffered any loss because of plaintiff's position; whether the material was subsequently sold for more or less than plaintiff's bid does not appear, and we believe the plaintiff is entitled to a judgment. Judgment will be awarded the plaintiff for $1,634.13. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

JOHN F. JELKE CO. v. THE UNITED STATES

[No. E–565. Decided April 4, 1927]

On the Proofs

Taxes; oleomargarine act; "Bakers' Select" and "Hi Puff".—The ruling of the Commissioner of Internal Revenue that plaintiff's products known as "Bakers' Select" and "Hi Puff" are taxable under the oleomargarine act *held* justified by the evidence, and final.

The Reporter's statement of the case:

Messrs. A. Coulter Wells and *W. Parker Jones* for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The John F. Jelke Co., plaintiff herein, was, during the years 1920 to 1924, inclusive, and ever since has been, and is, a corporation duly organized under the laws of the State of Illinois, having its principal place of business in the city of Chicago, and has been continuously, and is, engaged in the manufacture and sale of a cooking compound known as Bakers' Select and Hi Puff.

II. The Commissioner of Internal Revenue, assuming to act under the authority of the act of August 2, 1886 (24 Stat. 209), required during the years 1920 to 1924, inclusive, and continues to require plaintiff to pay a tax on all of the said cooking compound manufactured and removed from its factory for domestic consumption under the trade names of Bakers' Select and Hi Puff at the rate of one-fourth cent per pound as uncolored oleomargarine.

III. During the period January 1, 1921, to December 31, 1922, inclusive, plaintiff manufactured and removed from its factory for domestic consumption 2,553,273 pounds of Bakers' Select or Hi Puff, and during the period January 1, 1923, to June 30, 1925, inclusive, plaintiff manufactured and removed from its factory for domestic consumption 3,860,000 pounds of Bakers' Select or Hi Puff and affixed thereto, as required by the Commissioner of Internal Revenue, uncolored-oleomargarine stamps to the value of $6,383.18 and $9,650, respectively, amounting in all to $16,033.18.

IV. None of the cooking compound known as Bakers' Select or Hi Puff manufactured and removed as aforesaid was returned to plaintiff's factory or exported from the United States.

V. During the period December 15, 1920, to June 30, 1925, plaintiff purchased from the United States and paid for uncolored-oleomargarine stamps to the total value of $477,753.63.

VI. On or about December 13, 1924, plaintiff filed with the collector of internal revenue at Chicago, Ill., a claim for the refund of taxes paid in the sum of $6,512.50, which included the sum of $6,383.18, taxes paid on the quantity of Bakers' Select and Hi Puff manufactured and removed from its factory for domestic consumption during the period Jan-

uary 1, 1921, to December 31, 1922, as aforesaid; and on or about July 23, 1925, plaintiff filed with the said collector at Chicago a claim for the refund of taxes paid, as aforesaid, in the sum of $9,650, on the quantity of Bakers' Select and Hi Puff manufactured and removed from its factory for domestic consumption during the period January 1, 1923, to June 30, 1925, contending that Bakers' Select and Hi Puff was exempt from taxation under the act of August 2, 1886, because it was not "made in imitation or semblance of butter" and was not "calculated or intended to be sold as butter or for butter," but was a cooking compound which had been placed on the market in good faith as such and did not resemble butter in its general characteristics.

VII. The Commissioner of Internal Revenue rejected both of said claims under date of September 11, 1925.

VIII. The Commissioner of Internal Revenue made his decision rejecting said claim on the basis of an analysis of the products by an analytical chemist in his office.

IX. The products Bakers' Select and Hi Puff are identical. In the making their ingredients are cottonseed oil (40 per cent), oleostearin (23 per cent), skim milk (balance), with a later addition of salt. Cottonseed oil is that derived from the seed of the cotton plant. Oleostearin is obtained by applying pressure to beef fat, which extracts what is called oleo oil, leaving the oleostearin as the tough fibrous residue. The oleo oil is a soft, pale yellow fat which has a melting point at 25° C. as compared to a melting point of 45° to 50° for oleostearin. Skim milk is that which is left from whole milk after the butterfat or most of the butterfat has been removed.

X. Plaintiff's product is and has always been made in the manner following:

A batch consisting of the percentage proportions hitherto named or approximately 1,400 pounds of cottonseed oil, 800 pounds of oleostearin, and 1,000 pounds of skim milk, is placed in a vat and agitated until the ingredients are thoroughly mixed. This mixture is then allowed to flow out of the vat, and as it does so it strikes cold water, which causes it to congeal. It is then shoveled into wagons, drained, and placed in a cool storage room over night. The next day 300

pounds of salt is added to the mixture as it passes through several sets of rollers. This manipulation works out the water as it works in the salt. The greater portion of the product thus obtained is packed into 32 and 62 pound tubs, the remainder being wrapped in 5-pound blocks and packed in cases of two sizes holding 30 and 60 pounds, respectively. Very occasionally, by special request, small sample packages are prepared, or an order for a barrel is filled.

The blocks which are designed to be wrapped in 5-pound lots are placed on shelves and go into the cooler where they remain over night before wrapping.

XI. In its final form the plaintiff's product is of a glazy white shade, similar to that of lard, and is stiff, gummy, waxy, and fibrous.

It is offered for sale to and is used only by wholesale and retail bakers and institutions having baking departments, for the sole purpose of providing a shortening for what is called puff pastries—i. e., such pastries as patty shells, cream slices, cream horns, turnovers, and, in general, all doughs that have a lift or spring.

The high melting point, due to the presence of the large percentage of oleostearin, is responsible for this lift or spring which is imparted to the dough.

XII. The plaintiff's product has a barely discernible lactic-acid flavor and aroma. This it derives from the ripening process of the skim milk. This same flavor and aroma is found more positively in butter, but is, however, not the dominant or distinguishing characteristic of the butter flavor or aroma. Butter flavor as distinguished from milk flavor is more aromatic than acid and is one of the manifestations of the presence of butyric acid, not found in plaintiff's product.

A large part of the flavor and aroma of plaintiff's product is dissipated when subjected to the heat necessary in baking puff pastries, so that this aroma and flavor are not imparted in any perceptible degree to the pastry product resulting after baking. Such form of pastry is designed to have a flat or neutral taste, and a discernible odor or taste would not be desired by the baker for the reason that the flavor of the pastry when ready for sale is intended to be supplied

wholly by the filling which it contains, such as custards, jellies, etc.

XIII. The plaintiff's product would, generally speaking and for all practical purposes, be identical with a product made by the same methods but wherein water was substituted in place of milk. If water were so substituted, the lactic-acid taste and aroma would not be present. The use of milk produces, probably, a better emulsion, with the result that a product so made may possess better qualities for manipulation at the hands of the mixer of the dough in the bakeries. This quality is perhaps, however, so barely perceptible even to trained fingers that it may be termed negligible.

The plaintiff company manufactures a product under another name identical with the ones in issue, except for the substitution of water for milk. It has, however, never changed the formula which it puts out under the name Hi Puff and Bakers' Select. This policy has been adopted for the reason that these products were first made about 20 years ago with the same formula as is now used, and before it was known that water could be substituted, and, as a matter of business principle, plaintiff company does not desire to make a substitution of any nature after it has built up a trade with the product made in accordance with the original formula.

XIV. Butter is a soft fat usually (either naturally or artificially) yellow in color and is a product made from cream. It can not be made from skim milk because of the absence therein of the essential ingredients of butter, namely, fats. It is used as a spread for bread and in cooking and baking in all forms. Because of its high melting point, plaintiff's product can not be used as a substitute for butter as a spread for bread under ordinary living-room temperatures, nor for the usual cooking and baking purposes, its sole practical use being for the purpose hitherto set forth. As to this use, butter might be substituted for the purposes of an aid to the mixture of the dough for puff pastries, but would not provide the necessary lift or spring because of its low melting point. If a product such as plaintiff's were not available and butter had to be used as a substitute, puff pastries would not be marketable at any time other than during cold temperatures.

Butter when subjected to heat becomes gradually softer and softer while plaintiff's product stands up and does not become soft until very near the melting point. Butter is considered the perfect emulsion. If on an assumed scale of 0 to 100, the lowest form of emulsion be placed at 0 and butter at 100, plaintiff's product would range at about 10 on the scale. The lowest form of salable grades of oleomargarine used for general cooking would range from 30 to 50, and the better grades at from 85 to 90 on such a scale. These inferior grades of oleomargarine contain about 5 per cent oleostearin.

Besides the differences heretofore noted, plaintiff's product and butter are found to differ in the following:

Plaintiff's product has a melting point of 46° C.; butter has a melting point of from 28° to 36° C.

Plaintiff's product has a Reichert-Meissl number of 0.11; butter, according to Federal standard, has a Reichert-Meissl number of not less than 24.

Plaintiff's product contains 1.17 per cent salt; butter will vary from 0.5 per cent to 6 per cent salt.

Plaintiff's product contains 9.61 per cent moisture; butter will vary from 12 per cent to 16 per cent moisture.

Plaintiff's product, when chewed, clings to the teeth and will not readily dissolve in the mouth; butter, when chewed, does not cling to the teeth and readily dissolves in the mouth.

XV. Oleomargarine, as it was known prior to October 2, 1886, was first produced as a substitute for butter for the use of troops during the Napoleonic campaigns. The essential feature of the process of its manufacture was the churning of oleo oil in ripened milk. Oleo, oleomargarine, and butterine were different names for the same thing. Neutral, prior to the above date, was a very fine grade of product made from pig fat. It does not appear what lardine and suine had been known as prior to said date.

XVI. The $477,753.63 worth of uncolored-oleomargarine stamps purchased by the plaintiff from the defendant during the period December 15, 1920, to June 30, 1925 (Finding V), were used to the amount indicated in Finding III on packages of the products here in question sold for domestic consumption during that period.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

The plaintiff, John F. Jelke Co., during the years 1920 to 1924, inclusive, and for many years theretofore, manufactured and sold to bakers a cooking compound designated and known to the trade as "Bakers' Select," upon which product plaintiff has continuously paid a tax of one-fourth cent per pound under what is called the oleomargarine act of August 2, 1886.

In 1924 plaintiff filed claims for the refund of taxes aggregating $16,162.50 on the ground that its product did not come within the provisions of the oleomargarine act and was therefore exempt from taxation. These claims were rejected by the Commissioner of Internal Revenue, and this action is for the recovery of said sum.

Section 2 of the act of August 2, 1886, known as the oleomargarine act (24 Stat. 209), provides as follows:

"That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

Section 8 of said act, as amended by section 3 of the act of May 9, 1902, 32 Stat. 193, is the provision of law under which the tax in this case was collected. It is as follows:

"That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound. The tax levied by this section shall be represented by coupon stamps;

and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

It is the contention of the Government that the determination by the commissioner of the question involved herein is final and conclusive under section 14 of the act of August, 1886, above mentioned. That section is as follows:

"That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The commissioner may also decide whether any substance made in imitation or semblance of butter and intended for human consumption contains ingredients deleterious to the public health; but in case of doubt or contest his decision in this class of cases may be appealed from to a board hereby constituted for the purpose and composed of the Surgeon General of the Army, the Surgeon General of the Navy, and the Commissioner (now Secretary) of Agriculture; and the decisions of this board shall be final in the premises."

The ingredients used in the manufacture of plaintiff's product are cottonseed oil, 40 per cent; oleostearin, 23 per cent; and the remainder, skim milk. A small per cent of salt is added after the above ingredients are mixed.

The manufacture of plaintiff's product is accomplished by mixing cottonseed oil, oleostearin, and skim milk in the proportions named above, and in large quantities, in a container in which the materials are churned until the ingredients are thoroughly mixed. As it flows out of the container it strikes cold water, which causes it to congeal. It is then drained and placed in a cool storage room for about 24 hours.

A certain quantity of salt is then added to the mixture as it passes through several sets of rollers. This manipulation works out the water as it works in the salt. It is then ready for packing and preparation for market. The finished product has a lactic-acid flavor and aroma. The same flavor and aroma are found in butter, although it is not the dominant or distinguishing characteristic of butter.

It will be noted that cottonseed oil (vegetable oil) and oleostearin (beef fat) are specifically mentioned in section 2 of the oleomargarine act.

Plaintiff's product is taxable if (*a*) "made in imitation or semblance of butter," or (*b*) "when so made, calculated or intended to be sold as or for butter." It is not necessary that both conditions be present. If "made in imitation or semblance of butter" it is subject to tax under the oleomargarine act, and that seems to be the sole question for determination.

Obviously the purpose of the oleomargarine act is to impose a tax on all fat mixtures and compounds composed of the ingredients specified in section 2 of said act if made in imitation or semblance of butter. Water may be used instead of skim milk, and the product would, for all practical purposes, be identical with that produced by the use of skim milk. What, then, could be the purpose of using the more expensive mixing medium, except to obtain the slight butter semblance resulting from the use of skim milk? Plaintiff's product was subjected to a chemical analysis by the Commissioner of Internal Revenue, who held that it had a semblance of butter and was therefore taxable. Congress definitely specified in unmistakable terms the powers of the commissioner in this regard. The "commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act [sec. 14 of the oleomargarine act], and his decision in matters of taxation under this act shall be final." Undoubtedly Congress must have realized the difficulty which the commissioner might experience in the administration of the oleomargarine act, and it therefore provided for an analysis of mixtures and com-

pounds mentioned in the act by a specific agency to determine the taxability of same within the meaning of the act.

Without determining whether or not the ruling of the commissioner under this act would in all cases be final, certainly the conclusion reached by him in the instant case is amply justified by the facts, and in the absence of any suggestion that his action herein was arbitrary or capricious his ruling should be regarded as final.

It is therefore the judgment of the court that plaintiff's petition should be, and the same is hereby, dismissed. And it is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

ARTHUR CURTISS JAMES AND HENRY A. JAMES AS ANCILLARY EXECUTORS UNDER THE WILL OF JOHN ARTHUR JAMES, LATE OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, v. THE UNITED STATES

[No. D-1049. Decided April 4, 1927]

On the Proofs

Estate transfer tax; stock of American corporations transferred to British treasury.—Shares of stock in American corporations which were deposited in and transferred to the British treasury by their British owner under Scheme B, Special Treasury List, published in pursuance of the British Finance Act of July 19, 1916 (6 and 7 Geo. 5, c. 24), ceased to be the property of the owner and were not upon his death taxable under the revenue laws of the United States defining the gross estate of a decedent. See *Provost* v. *United States*, 269 U. S. 443.

The Reporter's statement of the case:

Mr. William L. Wemple for the plaintiffs. *Mr. Edwin D. Worcester* and *Worcester, Williams & Saxe* were on the briefs.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Arthur Curtiss James and Henry A. James, the plaintiffs, are native-born citizens of the United States, and each of them resides in the city of New York.

II. The claim which, as the plaintiffs allege, arose out of the matters set forth in their petition has not been assigned or otherwise disposed of; and the said Arthur Curtiss James and Henry A. James have at all times borne true faith and allegiance to the Government of the United States. Neither of them has at any time in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government of the United States.

III. John Arthur James, a resident of London, England, died in London on April 30, 1917, leaving a last will and testament whereby amongst other dispositions, he appointed certain citizens and residents of England to act as executors of said will and to have general administration of his estate; he also by said will appointed Arthur Curtiss James and Henry A. James, the plaintiffs, to be his American executors to administer his personal property situated in the United States.

IV. Said will was duly admitted to probate in England and letters testamentary thereunder were by the English probate court granted to the persons appointed by said will as English executors, and they duly qualified and have since acted as such.

V. An exemplified copy of the said will and the probate thereof was filed in the surrogates' court for the county of New York in the State of New York, and thereupon the surrogate of the said county of New York, under date of September 13, 1917, granted to said Arthur Curtiss James and Henry A. James ancillary letters testamentary under said will.

VI. The said Arthur Curtiss James and Henry A. James duly qualified and have ever since acted under said ancillary letters testamentary.

VII. On July 22, 1918, the present plaintiffs as ancillary executors as aforesaid made and verified a tentative return of the said estate for the Federal estate tax and filed the

same in the office of the collector of internal revenue for the district of Maryland. Such tentative return estimated the estate tax due thereunder to be $47,502.38 and at the same time the said ancillary executors paid such estimated tax in full.

VIII. Thereafter and on January 9, 1919, the said ancillary executors filed with the said collector at Baltimore a final return in the matter of the estate tax due or that might be claimed to be due from the estate of the testator; which said final return protested that certain securities designated therein as "stocks deposited by decedent with British treasury" did not constitute part of the estate of the said testator, and could not be lawfully included in the gross estate of the testator, for the purpose of determining the estate tax due to the United States.

IX. Thereafter and on March 7, 1919, the said ancillary executors verified and filed an amended final return in the matter of the estate tax due or that might be claimed to be due from the estate of said testator.

X. Thereafter and on February 3, 1921, the Commissioner of Internal Revenue made his determination of the estate tax due to the United States from the estate of the said testator; and in and by said determination the commissioner overruled and disallowed the protests of the ancillary executors against including as a part of the estate of said testator, for the purpose of computing the tax due under the estate tax statute, certain securities set forth in Appendix V, referred to in Finding IX, and determined the amount of said estate tax to be $325,610.69; which sum less the sum of $47,502.38 theretofore paid, the said ancillary executors, on March 9, 1921, paid under protest and under duress to the collector of internal revenue at Baltimore.

XI. Thereafter and on or about June 30, 1922, said ancillary executors duly filed an application for the refund of that portion of the tax assessed and paid as aforesaid, which was assessed and collected by reason of the inclusion in the decedent's gross estate of the securities referred to in Finding IX; and said application was on August 19, 1922, wholly

denied, rejected, and disallowed by the Commissioner of Internal Revenue.

XII. On November 27, 1914, the British Government enacted the statute, chapter 11, 5 and 6 George V, known as government war obligations act, 1914, a copy of which, marked "Appendix I," is attached to these findings and made a part hereof by reference.

On December 23, 1915, the British Government enacted the statute, chapter 96, 5 and 6 George V, known as government war obligations act, 1915, a copy of which, marked "Exhibit 2," is attached to the petition and made a part hereof by reference.

XIII. Pursuant to said chapter 96, the British treasury, in May, 1916, prepared and published a scheme containing the terms upon which securities would be received by the treasury and a list of the securities which would be so received. A copy of said scheme, marked "Appendix II," is attached to these findings and made a part hereof by reference.

XIV. Under the terms of said scheme the testator deposited in and transferred to the British treasury the following securities, which were at that time owned by him, to wit:

Railroad Co.	No. of shares
Great Northern Ry. Co. preferred	11,000
Northern Pacific Ry. Co	6,400
Atlantic Coast Line R. R. Co	1,660
Baltimore & Ohio R. R. Co	1,000
Chicago, Milwaukee & St. Paul Ry. Co. common	400
Chicago & Northwestern R. R. Co. preferred	200
Chicago & Northwestern R. R. Co. common	200
Delaware, Lackawanna & Western Ry. Co	805
Pennsylvania R. R. Co	1,400
Southern Pacific Co	800

XV. Under date July 19, 1916, the British Government enacted a statute known as the finance act 1916 (being chapter 24, 6 and 7 George V), which act was entitled as follows:

"An act to grant certain duties of customs and inland revenue (including excise) to alter their duties and to amend the law relating to customs and inland revenue (including excise) and the national debt, and to make further provision in connection with finance;"

and which reads in part as follows:

"PART 2, SECTION 27

"In addition to any other income tax or supertax charged under this or any other act, there shall, subject to the provisions of this section, be charged, levied, and paid for the year beginning on the 6th day of April, 1916, in respect of any part of the income of any person to which this section applies, an additional duty of income tax at the rate of two shillings for every pound of that part of the income. The income to which this section applies is the income derived from securities which are for the time being included in the special treasury list, as defined by this section, while those securities are so included; and the income shall, for the purposes of this section, be deemed to be derived at the time when the interest or dividends payable, in respect to the securities, become payable.

"The additional duty under this section shall not be charged on any income derived before the 29th day of July, 1916.

"3. A person shall be entitled to relief from the additional duty imposed by this section.

"(*a*) In respect of income derived between the date of the publication of the special treasury list and a date 28 days thereafter, if the securities are during that period offered to the treasury and ultimately become at the absolute disposal of the treasury, and

"(*b*) In respect of income derived from any securities included in the treasury special list, if the securities have been placed at the absolute disposal of the treasury.

"The provisions of this special section shall apply to an offer of securities for deposit in the same manner as they apply to an offer of securities for sale, and securities when accepted for deposit shall, while so deposited, be deemed to be at the absolute disposal of the treasury.

"7. In this section the expression 'securities' includes stocks, shares, and other securities, and the expression 'the treasury special list' means any list published by the treasurer in the Gazette, and for the time being in force, of securities which the treasury are willing to purchase in connection with any arrangements for the regulation and maintenance of the foreign exchanges."

XVI. Pursuant to said finance act, 1916, the British treasury, under date of August 12, 1916, published the said treasury special list, which document was officially headed

as Scheme B, and the preceding scheme was thereafter referred to as Scheme A. A copy of said Scheme B, marked "Exhibit 3," is attached to the petition and made a part hereof by reference.

XVII. The testator under the authority and inducements of said finance act, 1916, deposited in and transferred to the British treasury, under the provisions of said Scheme B, all the securities referred to in Finding XIV, which he had previously deposited in and transferred to the said treasury under Scheme A, and in addition thereto he also deposited in and transferred to the said treasury under Scheme B the following shares: 8,500 Great Northern Ore properties certificates. All the shares of stock so deposited in and transferred to the British treasury by him were accepted by said treasury under Scheme B and treasury warrants therefor were issued to said testator by said treasury in conformity with the provisions of Scheme B.

All the shares and certificates so deposited except the certificates for 8,500 shares of Great Northern Ores Co. were pledged and repledged by the British treasury and/or J. P. Morgan & Co., the agents for the British treasury in the United States, but all of said certificates and shares except 800 shares of Southern Pacific Co. had been redeemed from such pledgings by the time of the death of the decedent and were at that time in the hands of J. P. Morgan & Co. as agents of the British treasury. The 800 shares of Southern Pacific Co. were at the time of the decedent's death pledged by the British treasury and/or J. P. Morgan & Co., the agents for the British treasury in the United States, with the Farmers' Loan & Trust Co. as collateral for the United Kingdom two-year 5 per cent secured loan.

There is no evidence that the 8,500 Great Northern Ore certificates were specifically pledged by the British treasury. They were deposited by the testator under Scheme B on January 31, 1917; and they as well as all the other securities specified in Finding XIV were sold by the British treasury on the following dates:

Reporter's Statement of the Case

Amount and title of security		Date of sale
$31, 200 Atl. Coast Line Rly. com. stock	$26, 000	July 18, 1919
	5, 200	Feb. 2, 1920
50, 000 Balt. & Ohio Rly. com. stock	50, 000	July 11, 1919
20, 000 Chic. & N. West. Rly. pfd. stock	20, 000	July 11, 1919
25, 000 Del. Lack. & West. R. R. cap. stk	25, 000	July 11, 1919
3, 750 Del. Lack & West. R. R. cap. stk	3, 750	July 11, 1919
1, 100, 000 Gr. Northern Rly. pfd	1, 100, 000	July 11, 1919
640, 000 Nor. Pac. capital stk	640, 000	July 11, 1919
50, 000 Balt. & O. Rly. com. stk	50, 000	July 11, 1919
20, 000 Chic. & N. West. Rly. com. stock	20, 000	July 11, 1919
60, 000 Penn. R. R. Co. cap. stk	60, 000	July 11, 1919
80, 000 Southern Pac. Co. com. stk	80, 000	July 11, 1919
40, 000 Chic. Mil. & St. Paul Rly. com. stk	40, 000	July 11, 1919
68, 800 Atl. Coast Line R. R. com. stk	50, 000	July 30, 1919
	4, 000	Jan. 30, 1920
	14, 800	Feb. 9, 1920
11, 500 Del. Lack & West. R. R. cap. stk	11, 500	July 11, 1919
10, 000 Penn. R. R. Co. cap. stk	10, 000	July 11, 1919
66, 000 Atl. Coast Line R. R. com. stk	20, 000	July 18, 1919
	20, 000	Aug. 6, 1919
	26, 000	Jan. 30, 1920
212, 500 Gt. North. Iron Ore Properties Trustee certs	212, 500	July 17, 1919

XVIII. All of said certificates were at the time of the testator's death within the United States. All of said treasury warrants which were issued to the testator as stated in Finding XVII remained at all times within the Kingdom of Great Britain, and no one of them was ever held by or was in the possession of any person within the United States of America. Neither any of the securities so deposited with and transferred to the British treasury by the testator under Scheme B as aforesaid, nor any security of the same description and of the same nominal amount as any one of such deposited securities, was ever returned to the said testator or to any executor of his. All of the share certificates so deposited in and assigned to the British treasury by the testator under Scheme B as aforesaid were by the British treasury transferred from the name of said testator on the books of registry of the several corporations that issued said stocks, and at the time of the testator's death

no one of the said shares was registered in his name on the books of any one of the corporations that issued said stocks; but said stocks were registered in the name of J. P. Morgan & Co., in their capacity as the agents of the British treasury in New York, or their nominee. Since the death of said John Arthur James his English executors have in England sold, assigned, and transferred all of the said treasury warrants issued to the said John Arthur James and held by him at the time of his death.

XIX. The shares of stock so deposited in and assigned to the British treasury by the testator under Scheme B are the same securities the value of which was by the Commissioner of Internal Revenue included as a part of the gross estate of the testator in determining and assessing the estate tax thereon in supposed compliance with the Federal estate tax statute.

XX. The amount of the estate tax in respect of property of the testator which was admittedly located in the United States was $46,274.70.

The amount of the estate tax which the commissioner determined to have accrued to the United States by reason of his including as part of the testator's gross estate located in the United States, the securities hereinabove described as having been transferred to the British treasury under Scheme B, was $279,335.99.

The court decided that plaintiffs were entitled to recover the sum of $279,335.99, with interest at 6 per cent per annum from March 9, 1921, to date of judgment, a total of $381,060.85.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiffs are the executors of John Arthur James under ancillary letters testamentary issued in the State of New York on September 13, 1917.

John Arthur James, a British subject residing in London, died in that city on April 30, 1917, leaving a last will, in which he named the plaintiffs as his American executors to administer his personal estate situated in the United States. They duly qualified as such.

The plaintiffs' testator some time prior to his death, being then the owner and holder of certain shares of stock, deposited them in the British treasury pursuant to the provisions of a statute enacted by the British Government in 1915, and received therefor a certificate of deposit, or treasury warrant, a copy of which is not in the record. Subsequent thereto, and on July 19, 1916. another British statute was passed, the provisions of which will be referred to herein. Under the provisions and inducements of this latter statute the plaintiffs' testator deposited in and transferred to the British treasury all the said stock which, as stated, had theretofore been deposited in said treasury, and in addition thereto certain other shares of stock, which were received by the British treasury under "Scheme B," and for which he received other treasury warrants, in conformity with the provisions of said statute.

The greater part of these securities was pledged and repledged by the British treasury, and all of them, except 800 shares, had been redeemed prior to testator's death, and were in the hands of J. P. Morgan & Co., of New York, the agents of the British treasury. All of said shares of stock had been, prior to testator's death, transferred from the name of the testator on the books of the corporations that issued said stock, and were registered in the name of J. P. Morgan & Co., in their capacity as agents of the said treasury.

At the time of testator's death all of said stock was within the United States and all of the treasury warrants issued to the testator were and had always remained within the Kingdom of Great Britain. Neither these securities so deposited in and transferred to the British treasury, nor any securities of a similar description and value, were ever returned to the testator or his executors. After testator's death they were all sold by the British treasury between the dates July 17, 1919, and February 9, 1920, and the treasury warrants were sold, assigned, and transferred by testator's English executors.

The shares of stock deposited in and assigned by the testator to the British treasury are the same stock, the value of which was included by the Commissioner of Internal

Revenue of the United States in the gross estate of the testator in determining and assessing the estate tax thereon. For the refund of the amount of this tax, which was paid under protest by the plaintiffs, this suit was brought.

Certain portions of the British finance act of 1916, being chapter 24, 6 and 7 George V, will be found in a note appended hereto.[1] It will be seen that securities deposited under this act were deposited in and received by the treasury upon condition that they "ultimately become at the disposal of the treasury," and are "placed at the absolute disposal of the treasury," and while so deposited are "deemed to be at the absolute disposal of the treasury," and that the offer of the securities for deposit shall be treated "as an offer of the securities for sale."

[1] An act to grant certain duties of customs and inland revenue (including excise), to alter their duties, and to amend the law relating to customs and inland revenue (including excise) and the national debt, and to make further provision in connection with finance; * * *.

Part 2, section 27.—In addition to any other income tax or supertax charged under this or any other act, there shall, subject to the provisions of this section, be charged, levied, and paid for the year beginning on the 6th day of April, 1916, in respect of any part of the income of any person to which this section applies, an additional duty of income tax at the rate of 2 shillings for every pound of that part of the income. The income to which this section applies is the income derived from securities which are for the time being included in the special treasury list, as defined by this section, while those securities are so included; and the income shall, for the purposes of this section, be deemed to be derived at the time when the interest or dividends payable, in respect to the securities, become payable.

The additional duty under this section shall not be charged on any income derived before the 29th day of July, 1916.

3. A person shall be entitled to relief from the additional duty imposed by this section—

(a) In respect of income derived between the date of the publication of the special treasury list and a date 28 days thereafter, if the securities are during that period offered to the treasury and ultimately become at the absolute disposal of the treasury; and

(b) In respect of income derived from any securities included in the treasury special list, if the securities have been placed at the absolute disposal of the treasury.

The provisions of this special section shall apply to an offer of securities for deposit in the same manner as they apply to an offer of securities for sale, and securities when accepted for deposit shall, while so deposited, be deemed to be at the absolute disposal of the treasury.

7. In this section the expression "securities" includes stocks, shares, and other securities, and the expression "the treasury special list" means any list published by the treasurer in the Gazette, and for the time being in force, of securities which the treasury are willing to purchase in connection with any arrangements for the regulation and maintenance of the foreign exchanges.

Opinion of the Court

The plaintiffs' testator offered and deposited his securities upon these conditions and also upon the following terms:

That the transfer was to expire at the end of five years from March 31, 1917.

That the treasury had a right to return the securities after March 31, 1919.

That the depositor was entitled to receive from the treasury from time to time all interest and dividends paid in respect to said securities, and also one-half of 1 per cent per annum of the face value of the securities.

That the treasury had the right to dispose of the securities, but on this one condition: The lender was to continue to receive from the treasury the same payments he would have received if no disposition had been made.

That at the end of the period of loan the treasury had the right to return securities of the same description and amount as those deposited, or at its option to pay the depositor the deposit value of the securities with 5 per cent on the value plus accrued interest, and if the selling price exceeded the deposit value plus 5 per cent, then the average price realized by sales.

The depositor was required upon deposit to execute full and absolute transfers of registered stocks and bonds. The deposit certificates, or treasury warrants, as they were called, issued by the treasury were listed for dealings on the stock exchange.

It is plain that the plaintiffs' testator in depositing these shares of stock first surrendered his possession thereof and executed transfers to the British treasury, so that as far as these stocks were thereafter concerned he did not hold nor own them, because his right and ownership had been assigned to another upon delivery of the stocks with the right of disposal. After the transfer they were at the absolute disposal of the British treasury, as provided by the act under which they were deposited. In return for the surrender and transfer of these stocks, plaintiffs' testator received a certificate of deposit or a treasury warrant which, by the terms of the act, bound the British Government only to pay at the end of a given period the value of the stock as fixed in the act. In other words, the plaintiffs' testator received

in lieu of the stock so deposited a promise to pay by the British treasury. He could not by any proceeding at law or in equity at any time after the deposit have recovered anything but the value of the stock, and at his death the time for payment of the treasury warrant by the British treasury had not matured. He had at his death a chose in action instead of the stock, a promise to pay. In this view of the matter it is difficult to see how, under the revenue act of September 8, 1916, 39 Stat. 756, this property could have been determined to be and assessed as part of testator's gross estate because it was stock of domestic corporations "owned and held" by him as a nonresident.

The applicable part of the statute is as follows:

"SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

"(c) * * *

"For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, * * *."

Paragraph (c) above makes "stock in a domestic corporation owned and held by a nonresident * * * property within the United States" for the purposes of the act. The first paragraph of section 202 covers all of the property, and it is within this paragraph that it was the purpose of the

Opinion of the Court

act to incorporate stock in domestic corporations as part of the gross estate. But before it becomes or can be assessed as part of the gross estate it must have been "owned and held" by the nonresident at the time of his death.

As clearly appears from the preceding discussion, the shares of stock involved in this case were at the time of the testator's death neither owned nor held by him. The language of the statute is "owned and held." It is conjunctive, and the nonresident must not only at the time of his death have owned but also held the stock.

The final lawful sale and assignment to third parties by the British treasury of these shares of stock demonstrated that the possession, title, and ownership had passed to the British Government, all of them, as before stated, having been previously transferred on the books of the corporation to the name of J. P. Morgan & Co. The sale could have been legally made under the terms of deposit as well before the testator's death as after, and had this been done it probably would not have been, and certainly could not have been, successfully contended that he owned and held them at the time of his death.

The plaintiffs' testator, after the deposit and transfer, possessed no legal right at any time within five years or at the expiration thereof to demand or force the return of the specific shares deposited. Under these circumstances it can not be said that the British treasury was either a pledgee, a trustee, or a bailee, or that the plaintiffs' testator had any of the rights of a pledgor, *cestui que trust*, or bailor. The transaction here possesses none of the elements to establish either relation, for he neither owned nor held the stock at the time of his death.

The case of *Provost et al.* v. *United States*, 269 U. S. 443, 455–457, is controlling. It involved the question whether in short sales of stock a broker who lent stock to another broker with the knowledge that he would transfer it to the possession of a third party and thus gave him the power to do so, under an agreement to return other stock of the same kind, transferred title to the stock so delivered to the borrowing broker. The court held that it was such a transfer of title and said, "For the incidents of ownership the lender has

Syllabus

substituted the personal obligation, wholly contractual, of the borrower to restore him, on demand, to the economic position in which he would have been, as owner of the stock, had the loan transaction not been entered into"; that is to say, had a transaction similar in terms to the one we are considering been entered into in the United States between private individuals, it would, under the statute applicable in the *Provost case*, have been "a transfer of legal title" and delivery of shares or certificates of stock within the language of the statute, and requiring the use of stamps as in that case.

The instant case was not one of a deposit of stock as collateral for money loaned, for here all the incidents of legal ownership had passed from the plaintiffs' testator to the British treasury. The certificates or warrants received by the testator were obligations "wholly contractual" under which the British treasury was only bound to return him "to the economic situation in which he would have been had the transaction never taken place."

It follows that this stock should not have been assessed as part of the gross estate of the plaintiffs' testator by the Commissioner of Internal Revenue, and that the plaintiffs are entitled to recover the amount of tax assessed and paid by them on that account, which is the sum of $279,335.99, with interest at 6 per cent per annum from March 9, 1921.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

HEID BROTHERS v. THE UNITED STATES

[No. F-23. Decided April 4, 1927]

On the Proofs

Reformation of contract; mutual mistake.—In a contract to furnish fuel wood a provision that the price named is to be increased or decreased corresponding to changes in freight rates is by mutual mistake omitted. *Held*, that the contractor is entitled to have his contract reformed to speak the intention of the parties thereto and to judgment accordingly.

Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organzied under the laws of the State of Texas and having its principal place of business at El Paso, Tex.

II. Under date of June 15, June 30, and July 1, 1920, plaintiff entered into four contracts with the United States, known as Contracts Nos. 2330, 2384, 2393, and 2528, for delivery of fuel wood during the fiscal year 1921. All of the provisions of said contracts are identical, except as to the amount, price of wood, and time and rate of delivery, which are not in issue in this case, and being so identical, a copy of one of the contracts, No. 2393, is attached to the plaintiff's petition, marked "Exhibit No. 1," and is made a part hereof by reference.

III. The proposals for furnishing fuel covered by the said contracts were required to be opened May 14, 1920, at 10 a. m., at the office of Lieut. Col. C. A. Dravo, Director of Purchases, Raw Material and Paints Division, Quartermaster Corps, War Department, Munitions Building, Washington, D. C.

A copy of the circular proposal is attached to the petition of the plaintiff marked "Exhibit No. 2" and is made a part hereof by reference.

IV. Lieut. Col. C. A. Dravo was chief of the Division of Raw Materials and Paints, Quartermaster General's office, War Department, and was authorized by the United States to open bids submitted in pursuance of said circular proposal and to award and execute contracts made thereunder.

Prior to the opening of said bids the plaintiff advised the said Colonel Dravo that it desired it to be distinctly understood that its bid was based upon present freight rates and that if the freight rates were increased or decreased after the contracts were entered into its delivery price would be governed accordingly, and the said Colonel Dravo replied that this was clearly understood and informed plaintiff

that paragraph 11 of the specifications, which paragraph would be pasted on the contract and marked paragraph 19a, would provide for such increase or decrease of prices, but as a further precaution plaintiff asked permission of said contracting officer, as well as Colonel Elliott, who was Major Dravo's superior, to file with its bid a letter stipulating that the said bid was based upon freight rates then in effect, and providing for increase or decrease of the then present freight rates. Upon being advised by Colonel Dravo and Colonel Elliott that they had no objection to such letter being filed along with said bid, plaintiff therefore attached to its said bid, before delivery to the defendant, a letter dated May 14, 1920, addressed to the said Colonel Dravo, reading as follows:

"Referring to the attached proposals on wood for various posts and camps, beg to advise that our prices are based on freight rates now in effect. Should these rates be increased or decreased during the term of the contract, should we be awarded any of this business, our prices are to be governed accordingly."

V. When the said bids were opened by the defendant the said letter of May 14, 1920, was found pinned and attached to said bid, and the defendant, acting through Lieutenant Colonel Dravo, accepted the said bid as submitted and awarded the plaintiff the contract for the said wood in accordance with said bid with said letter attached.

VI. Due to a mistake of the subordinate in Colonel Dravo's office, no specific clause as was intended by the plaintiff and defendant was written into the said contracts providing for additional payment to plaintiff in the event the freight rates were increased or providing for reduction in the event freight rates were decreased, as provided for in the award and as stipulated in plaintiff's bid, and when said contracts were executed by the plaintiff the said plaintiff overlooked the fact that there was no such specific clause in the contract, so that due to mutual mistake of the parties to this suit no specific clause was inserted in said contracts providing for increase or decrease in freight rates as stipulated in plaintiff's bid, acceptance of the same, and the award of the said contract by the defendant.

VII. Thereafter, when the said contracts had been duly executed and freight rates were increased, plaintiff immediately made claim upon the defendant for additional payments due to said increase in freight rates, in accordance with its bid, and the defendant's contracting officer, who had awarded said contracts, and who had full authority to act for the defendant, under date of April 25, 1921, advised plaintiff in writing as follows:

"Receipt is acknowledged of your communication of April 20th *re* increased freight rates. The position you take regarding refundment by the Government to you of increased freight rates granted by the Government subsequent to your entering into contract for furnishing wood is absolutely correct.

"If provision covering this contingency was not made a part of your contract, it was due to an oversight in the office of which, at the time the contract was entered into, I was in charge. Your communication to me dated May 14, 1920, sets forth clearly that such a provision should have been made a part of your contract, and if at the present date such provision is not contained in your contract, the same should be so amended as to include that provision."

The office of the Quartermaster General, Washington, D. C., acting through Colonel Elliott, advised the plaintiff to like effect by letter dated September 2, 1920. Plaintiff, therefore, believing that said increased freight rates would be paid, as advised by the defendant, proceeded with the delivery of the wood under said contracts, but by reason of said increased freight rates was compelled to pay out the total sum of $19,527.74 more than it would have been required to pay out had there been no change in freight rates. Plaintiff made claim upon the defendant for said amount, but the Comptroller General refused to allow said claim on the ground that there was no provision in said contracts for payment of any increase in freight rates.

The court decided that plaintiff was entitled to recover $19,527.74.

HAY, *Judge*, delivered the opinion of the court:

The plaintiff is suing to recover the sum of $19,527.74, which it claims is due it by the United States.

On June 15, June 30, and July 1, 1920, the plaintiff entered into four contracts with the United States whereby it agreed to furnish and deliver to the United States certain wood for use at Ellington Field, Olcott, Tex. The proposals for furnishing the fuel covered by the said contracts were required to be opened May 14, 1920, at the office of Lieutenant Colonel Dravo, who was the purchasing and contracting officer of the United States authorized to open the bids and award and execute the contracts. Prior to the opening of the bids the plaintiff informed the contracting officer that it desired it to be understood that its bid was based upon present freight rates, and that if the freight rates were increased or decreased after contracts were entered into its delivery price would be governed thereby. The contracting officer stated that that was clearly understood, and that the contract would provide for such increase or decrease of rates; but the plaintiff was not satisfied with this verbal assurance and asked permission of the contracting officer to file with its bid a letter stipulating that the said bid was based upon freight rates then in effect, and providing for increase or decrease of the then existing freight rates. The plaintiff thereupon attached to its bid before delivery to the contracting officer a letter dated May 14, 1920, which reads as follows:

"Referring to the attached proposals on wood for various posts and camps, beg to advise that our prices are based on freight rates now in effect. Should these rates be increased or decreased during the term of the contract, should we be awarded any of this business, our prices are to be governed accordingly."

When the bids were opened by the defendant the letter of the plaintiff of date May 14, 1920, was found attached to the bid, and the bid so submitted was accepted and the contract awarded in accordance with the bid. Due to a mistake, no specific clause was written into the contract covering the increase or decrease of freight rates as was contemplated by the parties and stipulated for in the bid of the plaintiff, and the plaintiff in signing the contract believed the clause aforesaid was incorporated therein and signed the contract in that belief. After the contract had been executed freight rates

Opinion of the Court

were increased and the plaintiff at once made claim for additional payments due to the increase in freight rates. The contracting officer wrote the plaintiff under date of April 25, 1921, as follows:

"Receipt is acknowledged of your communication of April 20th *re* increased freight rates. The position you take regarding refundment by the Government to you of increased freight rates granted by the Government subsequent to your entering into contract for furnishing wood is absolutely correct.

"If provision covering this contingency was not made a part of your contract, it was due to an oversight in the office of which, at the time the contract was entered into, I was in charge. Your communication to me dated May 14, 1920, sets forth clearly that such a provision should have been made a part of your contract, and if at the present date such provision is not contained in your contract the same should be so amended as to include that provision."

The plaintiff therefore believing that the increased freight rates would be paid proceeded with the delivery of the wood under said contracts, and by reason of the increase in freight rates was compelled to pay and did pay the sum of $19,527.74 more than it would have been obliged to pay had there been no increase in rates.

The plaintiff made claim upon the United States for the aforesaid amount; payment thereof was refused, and the plaintiff thereupon brought this suit.

It is quite evident that both parties to the contract believed the provision providing for the increase or decrease in freight rates was embodied in the contract when it was signed by them; due to mistake, which was mutual, the provision aforesaid was omitted from the contract. Both parties understood the obligations imposed by the contract to be different from those stated in the written instrument. In such a case the court will reform the contract in accordance with the real intention and understanding of the parties shown by the evidence. We are therefore of opinion that the plaintiff is entitled to have the contract reformed so as to make it speak the intention of the parties to the contract, and that upon such reformation the plaintiff is entitled to recover the amount clamed, to wit, the sum of $19,527.74. See *Poole Engineering & Machine Company* v. *United States*, 58 C.

Reporter's Statement of the Case

Cls. 9; *Walter D. Lovell* v. *United States*, 59 C. Cls. 494; *Hygienic Fiber Company* v. *United States*, 59 C. Cls. 598; *Snellenburg Clothing Co.* v. *United States*, 60 C. Cls. 592; *West Leechburg Steel Co.* v. *United States*, 61 C. Cls. 294. See also 1 Comptroller General's Dec. 587 where in a case similar to this in all respects the Government was held liable.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

THOMAS A. SWEENEY, TRADING AS THOMAS A. SWEENEY STORAGE WAREHOUSES, v. THE UNITED STATES

[No. E-418. Decided April 4, 1927]

On the Proofs

Contract; interference by third party; order covering additional expense.—The plaintiff, in the performance of a contract for moving supplies and office equipment of the Veterans' Bureau from one building to another in consideration of a stated sum, was refused, contrary to established custom, the use of freight elevators in the building from which the moving was being done. He asked to be relieved of his contract, but completed the work upon being authorized by the contracting officer, through a "purchase order," covering the additional expense, to do so. *Held*, that plaintiff is entitled to recover the expense due to the interference with his work.

The Reporter's statement of the case:

Mr. Frederick N. Towers for the plaintiff. *Frost & Towers* were on the brief.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a citizen of the United States and a resident of the city of Chicago, State of Illinois, where he is engaged in the business of storing, moving, and trafficking in furni-

ture and other articles of household and office use, under the trade name and style of Thomas A. Sweeney Storage Warehouses.

II. Under date of May 29, 1922, the United States Veterans' Bureau, district No. 8, Chicago, Ill., issued a proposal for the moving of the equipment, furniture, and supplies of said bureau from the seventh, eighth, and tenth floors of the Leiter Building, No. 14 East Congress Street, Chicago, Ill., to the eleventh and twelfth floors of the Butler Brothers' Building, 101 Canal Street, Chicago, Ill.

Plaintiff filed a bid. His was the lowest bid received, and under date of June 10, 1922, it was accepted by the United States Veterans' Bureau, said acceptance being as follows:

UNITED STATES VETERANS' BUREAU,
Washington, D. C., June 10, 1922.

In reply to: L & C—1027—JEM.

THOMAS A. SWEENEY,
643 W. 69th St., Chicago, Illinois.

DEAR SIR: Your proposal to furnish services to the U. S. Veterans' Bureau at Chicago, Illinois, under charge of the district manager at Chicago, Illinois, during June, 1922, has been accepted as recommended:

Moving all equipment, furniture, and supplies from the 7th, 8th, and 10th floors of the Leiter Building Stores to the 11th and 12th floors of the Butler Brothers' Building, 191 Canal Street, at a cost of $3,100.00, as stipulated in the contract dated June 3, 1922.

The bureau has notified the manager of the acceptance of your proposal.

Respectfully,

W. C. BLACK,
Chief Clerk, U. S. Veterans' Bureau.

Under date of June 9, 1922, E. R. Burke, chief of the administration division of the bureau, signed a purchase order directed to plaintiff covering the work to be done.

III. Plaintiff reported on June 14, 1922, with the necessary men and equipment for completing the work, but representatives or agents of the Leiter estate, which controlled the Leiter Building, refused and denied him the use of the freight elevators which were ordinarily employed in moving furniture into and out of the building. It was the custom

in this and other office buildings in the city of Chicago to extend the use of elevators for the purpose of moving office equipment to or from the offices of incoming or outgoing tenants.

IV. On or about June 19, 1922, after plaintiff had been prevented during the five preceding days from making effectual use of the elevators in the building, plaintiff informed the then director of the bureau, C. R. Forbes, in the presence of the district manager and the chief of the administrative division of the bureau, of his inability to complete the contract, in view of the unforeseen obstacles which had been interposed. Said director thereupon advised plaintiff that it was of the utmost importance to the bureau that the moving of its furniture, equipment, and supplies should be completed before the 30th of June, 1922; that if, therefore, plaintiff would proceed with the work he would be properly compensated for the extra work; and under date of June 20, 1922, said director of the bureau confirmed by letter his direction or order to proceed with the work and to incur such necessary additional expenses as might be incidental to its completion under the circumstances. The director's letter of confirmation referred to above is in the following words and figures:

UNITED STATES VETERANS' BUREAU,
Washington, D. C., June 20, 1922.

DISTRICT MANAGER, DISTRICT #8,
U. S. Veterans' Bureau,
Chicago, Illinois.

DEAR SIR: You are hereby authorized to employ necessary personnel and incur such necessary expenses as may be incidental to the removal of the district office from the Leiter Building to the Butler Building. This authority is given for the purpose of facilitating the removal of the district office by June 30th and for the additional purpose of maintaining the district service at as high efficiency as possible.

Very truly yours,

(C. R. FORBES),
Director.

On June 22, 1922, a "purchase order" was duly issued covering the additional expense authorized by the director of the bureau, and a copy of this order is attached to the petition as Exhibit A and made a part hereof by reference.

Reporter's Statement of the Case

Acting upon the authorization so given, plaintiff proceeded at once to employ the necessary extra assistants and supply the necessary extra material to enable him to complete the work, and he did so complete the work within the required time. Thereafter plaintiff submitted his bills for the work done, including therein the extra charges agreed upon, as above set forth. The total bill was for $4,771.52. A voucher for $3,100 was duly issued and paid, leaving a balance due plaintiff of $1,671.52 under the contract as amended.

V. Under date of December 10, 1923, C. W. Spofford, district manager, wrote to the Director of the Veterans' Bureau at Washington, as follows:

UNITED STATES VETERANS' BUREAU,
Chicago, Ill., December 10, 1923.

The DIRECTOR U. S. VETERANS' BUREAU,
Washington, D. C.

DEAR SIR: My attention has been called to the fact that voucher in favor of Mr. Thomas A. Sweeney, for $1,671.52 additional payment above the contract price for moving supplies, office equipment, etc., from the Leiter Building to the Butler Building in June, 1922, has been disallowed by the comptroller. This is an unjust decision.

Mr. Sweeney contracted to move our offices from the Leiter Building to the Butler Building for a stated sum. He reported for work and after several days, owing to the obstacles placed in our way by the Leiter estate, was able to make practically no progress. He came to me and stated that he wanted to cancel his contract. We were in a very critical position, it being necessary, according to the legal department of the bureau, that all Veterans' Bureau equipment and supplies be moved from the Leiter Building before July 1, 1922. For that reason I refused to cancel Mr. Sweeney's contract and stated that under authority given me by Director Forbes under date of June 20 I was empowered to make such expenditures as were necessary in order to facilitate the removal of the district office. Mr. Sweeney proceeded with the contract and rendered bill for extras. This bill was carefully audited in this office, was somewhat reduced, and finally forwarded to central office.

In my judgment this bill is just and should be paid. The expenditure is authorized by the director himself and was incurred on account of the emergency existing. I recom-

mend that the bill be referred again to the comptroller and approved for payment.

Yours very truly,

C. W. SPOFFORD, *District Manager.*

The court decided that plaintiff was entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff in this case responded to a proposal issued by the United States Veterans' Bureau, District No. 8, Chicago, Ill. The situation was this: The bureau was occupying under a lease the seventh, eighth, and tenth floors of the Leiter Building, No. 14 East Congress Street, Chicago. A new location for the bureau had been acquired in the Butler Bros.' Building, 101 Canal Street, Chicago, eleventh and twelfth floors. The bureau was under the imperative necessity of vacating the Leiter Building by July 1, 1922, and the proposal issued solicited bids for removing the bureau from the Leiter to the Butler Building. Plaintiff offered to perform the service for $3,100 and his bid was accepted. No formal contract, except as evidenced by the proposal, plaintiff's bid and acceptance thereof, was executed by the parties. A purchase order was duly issued to the plaintiff on June 9, 1922. On June 14, 1922, the plaintiff, with all the necessary equipment and force of employees, appeared to commence the work, and, to their utter astonishment, were denied and refused the use of the freight elevators by the representative of the Leiter Building to transport the office furniture and supplies of the bureau from its quarters to the ground floor. It was and is an established custom in this and other large office buildings in the city of Chicago to make available to incoming and outgoing tenants the free use of the freight elevators. Whether in this instance the facility was denied the plaintiff solely because of the bureau's departure from the building does not appear; at any rate, no reason was assigned for such conduct, and the exercise of the arbitrary conduct not only seriously discommoded the plaintiff, but put upon him an extra expense of such proportions that compliance with his agreement upon the accepted consideration would entail financial loss.

Opinion of the Court

At the close of the fifth day after performance of the contract began plaintiff placed before the authorized officers of the bureau the serious situation which confronted him. He had not been able to make sufficient progress, and the added expense forced upon him the contemplated necessity of seeking a cancellation of his contract. The authorized officers of the bureau, after investigation, realized the handicap the plaintiff was working under, and on June 20, 1922, authorized the plaintiff to proceed with the performance and incur the necessary extra expense entailed by the arbitrary refusal to use the freight elevators. The plaintiff, acting finally under the written authorization of June 20, 1922, did go forward with the moving, and did incur an actual extra expense of $1,671.52. This amount has not been paid him, and for this sum this suit is brought. The officers of the bureau made a careful audit of the extra expense claimed, and after reducing the amount to some extent approved an allowance for the amount herein claimed.

The defendant opposes a judgment, basing its contention upon an assertion that the extra expense incurred by the plaintiff was in legal effect a bonus; that having contracted to perform the service for the stipulated sum of $3,100 the plaintiff could only be relieved from his contract through the intervention of acts of God or the other inevitable events which excuse performance of a contract. We believe the contention untenable. Plaintiff is not claiming a bonus; he seeks not something for nothing. It is conceded that the officers of the bureau possessed authority to make a contract for the removal of the bureau's effects from one place to another; and if such authority obtained in the first instance, how may it be denied that it did not continue to modify the agreement when mutually unforeseen and unanticipated events occurred which rendered the performance of the original agreement an unconscionable bargain and hardship? Both parties to the agreement entered into it with an understanding that the usual and customary facilities for its performance were available, and when they subsequently discovered that an entirely different situation prevailed there was nothing in the way of meeting the changed conditions. What the officers of the bureau did was not to increase the

profits of the plaintiff or give him more than the original contract provided; they simply modified the contract to the extent of assuming the additional expense put on the plaintiff over and above the original contract price by an event the happening of which neither party to the agreement contemplated when the contract was made, and one which both parties in the usual course of business of this character had a right to assume would not happen. It would be folly to conclude that the plaintiff would have agreed to remove the bureau for the amount stated in his contract if he had any reasonable ground to believe that he would have been required to carry by hand from the seventh, eighth, and tenth floors all the equipment and supplies of the bureau to the ground floor when a freight elevator was at hand and available for this transportation.

The contract in suit was made in view of an established usage and custom, one long prevalent; both parties to the agreement recognized its existence, and both were equally disconcerted by its refusal. The plaintiff could not go on with the performance of his contract when he faced an additional expense of more than 50 per cent of the price he had originally agreed to charge, an expense which others similarly situated would not have had, and had no reasonable grounds to anticipate. The bureau realized that it had no right to insist upon performance under the changed conditions, and expressly promised that if the plaintiff would proceed the bureau would see that he received reimbursement for the extra cost. The plaintiff did proceed under these conditions and under them only. It is not unusual to increase the consideration for a contractual obligation when in the course of performance unforeseen events radically change the relationship of the contracting parties, and by so doing controversy over the terms and conditions of the original contract is obviated and set at rest. *Cook* v. *Murphy*, 70 Ill. 96; *Hostetter* v. *Park*, 137 U. S. 30, 40. By so doing, the increased consideration is not a bonus. The cases in this court cited in defendant's brief are inapposite. Manifestly if the plaintiff was to be paid additional compensation by way of savings he was under contract to save in any event, the pay-

ment would be a gratuity and without consideration. If the defendant received no benefit in return for payment of added sums, of course the sum to be paid is a *bonus;* but such is not the case here. The bureau was put to the necessity of removing within a certain period. It had to get out by July 1, 1922. The plaintiff agreed, for a stated sum, to remove all its effects in the usual and customary manner of making removals under the circumstances of the particular case. During the course of the removal the transaction developed into an extraordinary undertaking, one at no time within the contemplation of the parties, and inasmuch as the bureau had not exhausted its authority to incur the expense of removal, assuredly nothing stood in its way of paying for the service rendered the full amount of the worth of said services.

Judgment for the plaintiff for $1,671.52. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

BOTANY WORSTED MILLS v. THE UNITED STATES

[No. D-747. Decided April 4, 1927]

On the Proofs

Taxes; compromise settlement.—Where in conferences between a taxpayer and the Bureau of Internal Revenue various disputed items affecting the amount of the tax to be paid are decided by compromise, the taxpayer can not retain the advantage derived by him from the settlement and at the same time recover on other items which he regards as unfavorable to his interests.

The Reporter's statement of the case:

Mr. Nathan A. Smyth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office at Passaic in said State, and is now and was during all of the times hereinafter mentioned engaged in the general business of manufacturing and selling woolen and worsted fabrics.

II. Under the provisions of an act of Congress approved September 8, 1916, entitled "An act to increase the revenue, and for other purposes," 39 Stat. 756, and an act of Congress approved October 3, 1917, entitled "An act to provide revenue, to defray war expenses, and for other purposes," 40 Stat. 300, and regulations of the Treasury Department entitled "Regulations No. 33 covering the collection of the income tax imposed by the act of September 8, 1916, as amended by the act of October 3, 1917," approved by the Secretary of the Treasury on January 2, 1918, the plaintiff prepared and filed its return of net income for the taxable year ending November 30, 1917. Plaintiff paid to the United States, on June 14, 1918, taxes in the sum of $2,291,167.77, in accordance with the return filed.

III. In the said return for the year ending November 30, 1917, the plaintiff deducted amounts paid to the members of its board of directors for the said taxable year, aggregating $1,565,739.39, in addition to salaries of $9,000 each, received by the individual members of said board. The said sum of $1,565,739.39 was a sum equal to 32 per cent of the balance of the net profits for the taxable year 1917 and was paid in accordance with and after making the several deductions provided for in the by-laws of the plaintiff corporation.

IV. On September 11, 1919, the Commissioner of Internal Revenue disallowed as a deduction a portion of the said sum of $1,565,739.39, so paid as compensation to the members of the board of directors, to wit, $783,656.06 thereof. On or about the 17th day of June, 1920, an additional assessment in the aggregate sum of $703,578.37 was made against the plaintiff, and the said sum was paid by the plaintiff to the United States on or about June 28, 1920. Of this

amount $450,994.06 was attributable to the said disallowance by the Commissioner of Internal Revenue of the said sum of $783,656.06, a part of the amounts paid to the members of the board of directors as a deduction for the taxable year 1917. Notices of said additional assessment were sent to plaintiff on June 15, 1920, and June 17, 1920, respectively. The disallowance so made was on the ground that the amounts paid as compensation were unreasonable, and that the deductions allowed represented fair and reasonable compensation.

V. On or about February 1, 1922, the plaintiff filed with the Commissioner of Internal Revenue a claim for refund of the said sum of $450,994.06, and the said claim was disallowed by the Commissioner of Internal Revenue on or about September 26, 1922.

VI. The plaintiff was incorporated in May, 1889, with an original authorized capital stock of $1,100,000. The authorized capital stock was increased in 1890 to $1,750,000, in 1899 to $2,500,000, in 1903 to $3,000,000, and in 1908 to $3,600,000.

VII. The plaintiff was organized by Eduard Stoehr, who was the head of a firm of woolen manufacturers doing business in Leipzig, Germany, known as Kammgarn-Spinnerei Stoehr & Company. A meeting of the stockholders of the plaintiff was held on January 11, 1890. From the records of that meeting it appears that at that time the owners of 9,180 shares out of the total 11,000 of authorized stock were citizens and residents of Germany. Of these shares 7,000 were owned by Kammgarn-Spinnerei Stoehr & Company, and 500 were owned by Eduard Stoehr. At that meeting of the stockholders the by-laws of the company were unanimously adopted. Said by-laws contained the following provisions:

"Article 22. Distribution of profits

"Par. 1. After the close of every half of the business year of the company a computation of profits shall be made, and if practicable a dividend not exceeding three per centum shall be paid to the stockholders.

"Par. 2. At the close of the business year the net profits shall be distributed as follows, after suitable deductions shall have been made from the value of the property of the company:

"'(1) A dividend of six per centum is to be paid to the stockholders, in the computation of which any dividend or dividends already paid to the stockholders during the same business year shall be included.

"'(2) The balance remaining is to be applied as follows:

"'(a) Five per centum shall be placed in a reserve fund until the amount of the reserve fund thus accumulated shall be equal to twenty per centum of the paid-up capital of the company for the time being.

"'(b) Twenty-five per centum is to be paid as a bonus to the board of directors.

"'(c) Seventy per centum is to be paid as additional dividend to the shareholders.'

"The board of directors may, however, with the consent of the majority of the shareholders, use a portion of the amount mentioned in the last paragraph, marked 'c' for special deductions from accounts or for the formation of a special reserve fund or for extra compensation to be paid to employees or for any institutions which will benefit the employees, such as pension funds and the like."

VIII. The said article 22 of the by-laws, adopted January 11, 1890, remained unchanged until April 11, 1903, at which time it was amended at a stockholders' meeting so that subdivision 2–b of paragraph 2 thereof read: "Forty per centum is to be paid as a bonus to the board of directors."

IX. The said subdivision 2–b of paragraph 2 of article 22 of the by-laws remained the same (except that said article was renumbered article 21 in August, 1904) until March 21, 1905, when it was amended at a meeting of the stockholders to read as follows:

"2–b. A compensation equal to forty per centum of the said balance shall be allowed or paid to the board of directors for their services."

X. The said subdivision 2–b remained unchanged until a meeting of the stockholders held on March 17, 1908, when article 21 of the by-laws was amended so that as a whole it read as follows:

"Par 1. After the close of the first half of every business year of the company a computation of profits shall be made,

and if practicable a dividend not exceeding three (3) per centum shall be paid to the stockholders. This dividend shall be payable on September 15th following.

"Par. 2. At the close of the business year the net profits shall be distributed as follows, after suitable deductions shall have been made from the value of the property of the company:

"(1) A dividend of six (6) per centum is to be paid to the stockholders, in the computation of which said dividend payable on September 15th of the same business year shall be included.

"(2) The balance remaining is to be applied as follows:

"(a) Five (5%) per centum thereof shall be placed in a reserve fund until the amount of the reserve fund accumulated shall be equal to twenty (20%) per centum of the paid-up capital of the company for the time being.

"(b) A compensation equal to thirty-two (32%) per centum of the said balance shall be allowed or paid to the board of directors for their services.

"(c) The residue is to be applied to the payment of an additional dividend to the stockholders, which is to be determined by the board of directors, subject to the approval of the stockholders at the annual meeting assembled. The board of directors may, however, with such approval of the stockholders, use a portion of said residue referred to in this paragraph (c) for special deductions from accounts or for the formation of special reserve funds or additional reserves, or for extra compensation to be paid to employees, or for any institutions which are designed to benefit the employees, such as pension funds and other similar institutions.

"Said additional dividend shall be payable on April 15th following the declaration thereof, unless the directors, with the approval of the stockholders, appoint another day for its payment."

The foregoing provisions remained in force until after the close of the taxable year 1917, and during that period compensation was paid to the directors in accordance therewith.

XI. The directors of plaintiff for the year 1917 were Thomas Prehn, Ferdinand Kuhn, Hans E. Stoehr, Max W. Stoehr, George Roehlig, Camill A. Mehl, Otto Kuhn, A. de Liagre, Eduard Stoehr, and George Stoehr.

During the early part of the year 1918, 25,605 shares of the stock of the plaintiff were seized as alien property by

the Alien Property Custodian, who by virtue of such control on the 2d day of April, 1918, caused a new board of directors of the plaintiff corporation to be elected. Such board consisted of—

Francis P. Garvan.	James N. Wallace.
Horace C. Jones.	Thomas J. Maloney.
Andrew B. Duvall.	H. C. McEldowney.
George T. Smith.	Thomas Prehn.
Max W. Stoehr.	George Roehlig.
Ferdinand Kuhn.	

Of this board Messrs. Prehn, Stoehr, Roehlig, and Kuhn had previously been connected with the company. The other seven were nominees and representatives of the Alien Property Custodian. Mr. Garvan was at that time chief of the bureau of investigation in the Alien Property Custodian's office and in March, 1919, became Alien Property Custodian.

XII. Subdivision 2–b of the by-laws was in effect all of the year 1917 and until July 30, 1918, when said subdivision 2–b was amended by the stockholders to read as follows:

"(b) Such sum, not exceeding thirty-two per cent (32%) thereof, as the board of directors shall in its sole discretion determine, shall be paid to the members of the board of directors and officers and executives or any of them as additional compensation for their services. Each such director, officer, and executive shall receive of said sum such proportion as shall be determined by the board of directors. Said proportion may as to any one or more of said directors, officers, and executives be so determined after the close of said business year, or in the sole discretion of the board of directors at any time, prior to the close of said business year by contract between the company and such director, officer, or executive."

At the time of this amendment the Alien Property Custodian of the United States was the holder of record and voted the majority of the stock of the plaintiff.

XIII. From the outset the determination of the total amount of profits of the company and of the aggregate amount payable to the board of directors in accordance with the by-laws, was made by the board of directors. The basis

of apportionment among the several directors of the aggregate amount payable to the board of directors as a whole, in accordance with the by-laws, was up to the year 1917 recommended to the board by its chairman, Eduard Stoehr, in conjunction with the treasurer and vice president. In the year 1918, Eduard Stoehr being in Germany, the apportionment was recommended by Hans Stoehr, treasurer of the company, in conjunction with a committee consisting of the president, Thomas Prehn, and the vice president, Ferdinand Kuhn.

XIV. No written or oral contract was at any time made with any of the directors as to what his compensation should be, other than such contract as was implied from his election to and acceptance of membership on the board, and his service as such a member in accordance with the by-laws and customary practices of the company, which were known to each such director. At all times each director held a position as an executive officer or manager of a department in the company. In 1918 express agreements were made between the company and the directors for a fixed salary and guaranteed bonus.

The net income of the plaintiff in the years indicated was as follows:

1910	$784, 344. 44	1915	$1, 393, 922. 43
1911	456, 440. 02	1916	2, 694, 150. 89
1912	618, 402. 80	1917	7, 953, 512. 80
1913	497, 090. 61	1918	6, 796, 387. 56
1914	844, 181. 46		

XV. The plaintiff paid to the directors in pursuance of the aforementioned by-laws the following amounts:

1910	$268, 444. 19	1915	$400, 935. 18
1911	132, 704. 85	1916	693, 617. 16
1912	217, 395. 64	1917	1, 565, 739. 39
1913	169, 925. 00	1918	593, 416. 96
1914	218, 026. 67		

The plaintiff took credit in its tax returns for said payments in the years 1910, 1911, 1912, 1913, 1917, and 1918. In the years 1910 to 1916, inclusive, the Government did not

allow any deduction for the amounts so paid and plaintiff paid its taxes accordingly for said years.

XVI. The gross assets of the plaintiff and its net assets, including reserves, as shown by its balance sheets, were as follows:

	Gross assets	Net, including reserves
1890	$1,114,149.63	$37,136.35
1900	8,888,243.37	2,138,306.56
1910	14,234,978.83	4,743,592.93
1917	28,893,777.12	10,999,862.48

XVII. At a meeting of the board of directors of the plaintiff, held March 25, 1918, the following resolution was adopted:

"*Resolved*, That the balance sheet and profit and loss account be spread in full on the minutes of the company; that the amount of four hundred thousand dollars ($400,000) be set aside for depreciation and also the amount of two hundred sixteen thousand dollars ($216,000), being six (6%) per cent dividend on the capital stock of the company, including three (3%) per cent dividend paid on September 15, 1917, as well as the compensation of the board of directors for the year 1917, namely, thirty-two (32%) per cent of five million three hundred forty-five thousand seven hundred twenty-four dollars and thirty-five cents ($5,345,-724.35), being equal to one million seven hundred ten thousand six hundred thirty-one dollars and seventy-nine cents ($1,710,631.79) be credited to the members of the board of directors in accordance with the by-laws of the company."

XVIII. On April 15, 1918, John Quinn was, at the suggestion of the Alien Property Custodian, duly elected counsel for the plaintiff company at a meeting of its board of directors, held on that day, and ceased to be counsel on March 29, 1921.

XIX. An investigation of the books of the plaintiff by a representative of the defendant disclosed to the Commissioner of Internal Revenue the necessity of making a different assessment against the plaintiff than appeared due from its said return for the year ending November 30, 1917. The taxes for the said year were to be determined by the

settlement of questions relating to the bonus paid to the company's directors, excessive depreciation charged off on the books of the company, and reserves charged to expenses.

After much correspondence and numerous conferences extending over a period of several months in which the plaintiff was represented by its attorney, John Quinn, and by its assistant treasurer, W. J. Helmer, and other parties, and the defendant represented by Sidney Alexander, chief of the special audit section, Bureau of Internal Revenue, and others of his official associates, a compromise was agreed to as to all of the differences. In the said conferences Alexander informed Quinn that in view of the fact that the organization controlled by the Alien Property Custodian had considered the compensation paid to the directors for the year 1918 as being fair and reasonable, the same conclusion "could be reached upon the part of the Government in considering it a fair and reasonable amount for 1917." The results of the said conferences were reported by Quinn to the plaintiff's board of directors from time to time during their continuance.

The following is an excerpt from the minutes of a meeting of plaintiff's board of directors held April 23, 1920:

"* * * Counsel succeeded some time ago in effecting a compromise on the question of bonuses to directors and the amount transferred from depreciation on buildings and machinery to the surplus account, as to which counsel made a report to the board and which was satisfactory to the board.

"The company then received an assessment of $1,144,-821.02, covering the years 1916, 1917, and part of 1918. This assessment was the subject of careful consideration by the company and conferences with counsel and conferences with the department by counsel, and the subject of supplemental memoranda and hearings.

"At the last hearing there was a great deal of discussion in regard to the reluctance of the department to allow for those years the large items of bonuses to employees and deductions for reserves, but they finally agreed to allow the bonuses to employees, the deductions for reserves, and all of counsel's other points.

"Counsel arranged an adjustment of the bonuses for the year 1917 on the same relative basis as the bonuses for the year 1918, approved by the reorganized board.

Reporter's Statement of the Case

"Assuming that the bonus to directors in 1917 will remain as originally agreed to, that is, on the relative basis of the 1918 bonus, the additional tax to the Government for the years 1916, 1917, and 1918 will amount to $718,770.11.

"This shows a saving to the company between the original amount claimed and what will be the final assessment of $663,507.16.

"The Government accepted the contentions presented by counsel for the company on all of the essential questions that counsel for the company and the officers of the company felt were right and proper under the law and facts."

Thereafter amended returns were prepared and executed by plaintiff's executive officers, based upon the figures as agreed upon in the said conferences, and were filed with the Commissioner of Internal Revenue together with documentary evidence which it was agreed upon at the last conference should be furnished, and the tax so computed, with a slight change not material to this case, was paid by the plaintiff.

XX. The total compensation paid to the executives and members of the board of directors for the year 1918 was allowed by the Commissioner of Internal Revenue as a proper deduction for that year.

XXI. John Quinn, Hans Stoehr, Otto Kuhn, Thomas Prehn, and George Roehlig died prior to the joinder of issue herein.

XXII. The compensation of directors and executive officers for their services on the basis of percentage of profits has for many years been the practice among many corporations engaged in the woolen manufacturing business.

XXIII. In November, 1923, the Alien Property Custodian sold to Max W. Stoehr, pursuant to Executive order, 14,910 shares of the plaintiff company. In June, 1924, he likewise sold 2,455 shares to C. F. H. Johnson, and in November, 1924, he sold 5,310 such shares to C. F. H. Johnson. All of such shares, shortly after their purchase, were acquired and became the property of Botany Consolidated Mills (Inc.), a Delaware corporation.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

Moss, *Judge*, delivered the opinion of the court:

In its tax return for the year 1917 plaintiff, Botany Worsted Mills, claimed as a deduction for compensation paid to its board of directors for the year 1917 the aggregate sum of $1,565,739.39 in addition to certain nominal salaries paid to the members of said board. The Commissioner of Internal Revenue disallowed on this item the sum of $783,-656.06, and on or about June 17, 1920, an additional assessment in the aggregate sum of $703,578.37 was made against plaintiff, which sum was paid by plaintiff on or about June 28, 1920. Of this amount $450,994.06 was attributable to the disallowance by the commissioner of the said sum of $783,-656.06, being a portion of the amounts paid as compensation to its directors, and claimed as a deduction for the year 1917. On February 1, 1922, plaintiff filed with the commissioner a claim for the refund of said sum of $450,994.06, which claim was rejected. This action is for the recovery of said amount.

The tax in this case was collected under the act of September 8, 1916, 39 Stat. 756, as amended by the act of October 3, 1917, 40 Stat. 300, the applicable portion of which is as follows:

"§12. (a) In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

"First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, * * *."

On January 11, 1890, plaintiff incorporated in its by-laws the following provision:

"Par. 1. After the close of every half of the business year of the company a computation of profits shall be made, and if practicable a dividend not exceeding three per centum shall be paid to the stockholders.

"Par. 2. At the close of the business year the net profits shall be distributed as follows, after suitable deductions shall have been made from the value of the property of the company:

"'(1) A dividend of six per centum is to be paid to the stockholders, in the computation of which any dividend or dividends already paid to the stockholders during the same business year shall be included.

"'(2) The balance remaining is to be applied as follows:

"'(a) Five per centum shall be placed in a reserve fund until the amount of the reserve fund thus accumulated shall be equal to twenty per centum of the paid-up capital of the company for the time being.

"'(b) Twenty-five per centum is to be paid as a bonus to the board of directors.

"'(c) Seventy per centum is to be paid as additional dividend to the shareholders.'

"The board of directors may, however, with the consent of the majority of the shareholders, use a portion of the amount mentioned in the last paragraph, marked 'c' for special deductions from accounts or for the formation of a special reserve fund or for extra compensation, to be paid to employees or for any institutions which will benefit the employees, such as pension funds and the like."

The above provision remained in effect until April 11, 1903, at which time it was amended so that subdivision 2-b of paragraph 2 thereof read: "Forty per centum is to be paid as a bonus to the board of directors." In March, 1908, it was again amended so as to provide as compensation to the directors a sum equal to "32 per centum of said balance * * *." From that time until after the close of the taxable year 1917 the above provision remained in force, and annual payments during that period have continuously been made in accordance therewith. The said sum of $1,565,739.39 was a sum equal to 32 per cent of the balance of the net profits for the taxable year 1917, after the several deductions provided for in said by-laws had been made.

The Government has interposed two defenses to this action: First, it is claimed that the amount paid the directors for 1917 was unreasonable compensation; and, second, that in 1919 the various tax matters of plaintiff for 1917 were finally settled by compromise and mutual agreement. These contentions will be considered in the order named above.

It is shown by the record that during the whole period of plaintiff's existence its executive officers have been paid

Opinion of the Court

as compensation in addition to certain fixed salaries a percentage of the net earnings. The board of directors determined each year the aggregate amount payable to its members in accordance with the by-laws. The distributions among its members were made by the board on the recommendation of its chairman, in conjunction with its treasurer and vice president. Each director holds a position as an executive officer, or manager, of a certain department of the business. This method of compensation was consistently followed for nearly 30 years, during which time the gross assets of plaintiff company had increased from $1,114,149.63 in 1890, to $28,893,777.12 in 1917; and its net assets, including reserves, had increased from $37,136.35 in 1890 to $10,999,862.48 in 1917. It is also made to appear that such method of compensating directors and officers has been the practice in many corporations engaged in the woolen manufacturing business. It follows, therefore, that the payment of such compensation to the directors of this corporation for the year 1917 constituted one of the "ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties * * *." The Commissioner of Internal Revenue, under the act of 1917, did not have authority to determine whether or not compensation paid to its officers by a corporation was unreasonable compensation, and to limit the deduction to what he might consider reasonable compensation. He did have the right to determine whether or not the amount paid as compensation or salary was in fact something else, paid under the guise of salary. In this case the Government has not claimed that any part of the payments to the directors was not compensation, as claimed by plaintiff. The contention is, that the commissioner had authority to reduce the amounts actually paid to what he considered reasonable compensation. The case of *United States* v. *Philadelphia Knitting Mills Company*, 273 Fed. 657, decided June 13, 1921, seems conclusive on this point.

The Government contends that there was no legal authority at the time of the settlement of plaintiff's taxes for the compromise of taxes between the Government and a taxpayer,

except as contained in section 3229 of the Revised Statutes, which reads as follows:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise," and that inasmuch as the procedure prescribed by this section was not adopted the agreement was invalid and unenforceable. It is not claimed by the Government that plaintiff's taxes were settled under the provisions of section 3229. The theory upon which its defense on this point is based is that an agreement was entered into between plaintiff and the Commissioner of Internal Revenue under which plaintiff accepted the partial disallowance as to compensation, and also received certain concessions as to other disputed items, the benefit of which it still enjoys, and that, therefore, plaintiff is estopped from recovery in this action. In addition to the question of compensation there was pending at the same time and for the same year the question of depreciation and also the question of reserves charged to expenses. These items involved important amounts. All matters in dispute between plaintiff and the Government were settled, and the 1917 taxes were paid in accordance with the agreements theretofore reached in conference in the Internal Revenue Bureau. The negotiations in the bureau extended over a period of several months, involving considerable correspondence and numerous conferences.

Opinion of the Court

With reference to the compensation item, it should be mentioned that on July 30, 1918, the Alien Property Custodian, holding more than two-thirds of the shares of plaintiff company, caused the by-laws with reference to the compensation feature to be amended so as to provide that the directors should thereafter receive such sum, not exceeding 32 per cent of the balance of the net profits, "as the board of directors shall in its sole discretion determine." Under the amended by-laws, and by the determination of the board, the directors received as their aggregate compensation for the year 1918 the sum of $593,416.96. In the conferences in the bureau plaintiff was represented by its counsel, John Quinn, who died before this action was instituted, and the bureau was represented by Sidney Alexander, then chief of what is called the special audit section, together with certain of his official associates. Plaintiff's counsel was advised by Alexander that in view of the fact that the new ownership, meaning the Alien Property Custodian, had considered the compensation for the year 1918 as being fair and reasonable, it was his opinion that the same conclusion "could be reached upon the part of the Government in considering it a fair and reasonable amount for 1917." This item was finally settled on that basis. From time to time throughout the progress of the negotiations in the bureau plaintiff's counsel reported to its board of directors the substance of the matters occurring in such conferences. That plaintiff derived an advantage in the settlement of this controversy is shown by the minutes of its board of directors of date April 23, 1920, wherein the various items in dispute, all having been agreed upon in conference, were discussed. (See Finding XIX.) The following statement is made:

"This shows a saving to the company, between the original amount claimed and what will be the final assessment, of $663,507.16."

Thereafter plaintiff prepared amended returns based upon the figures theretofore agreed upon in the bureau conferences, and same were forwarded to the Commissioner of Internal Revenue, together with certain documentary evidence which it was agreed at the last conference in the

bureau should be furnished. With one slight change the tax shown by the amended returns was paid.

With the payment of the tax under the circumstances surrounding this case the agreement, which is mentioned in the record as a "gentleman's agreement," became in legal effect an executed contract of settlement. Plaintiff now seeks to recover on account of the particular item, which it regards as unfavorable to its interests, and at the same time hold to the advantage derived from the settlement of other items in dispute involved in the same general settlement.

It is the opinion of the court that plaintiff should not be allowed a recovery. It is therefore adjudged that the petition herein should be, and the same is hereby, dismissed.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

ROBERT H. LENSON v. THE UNITED STATES

[No. E-38. Decided April 4, 1927]

On the Proofs

Navy pay; fourth-pay period; act of June 10, 1922.—An officer of the Navy, commissioned as a lieutenant, in service as such on June 30, 1922, and at that time having attained a total naval service, enlisted and commissioned, of 15 years, 2 months and 14 days, was entitled, under the act of June 10, 1922, on and after July 1, 1922, to pay of the fourth period.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The following are the facts as found by the court:

I. The plaintiff, Robert H. Lenson, enlisted in the Navy February 25, 1907, and served as an enlisted man under his original and subsequent enlistments continuously until May

2, 1918, when he received a temporary appointment as acting pay clerk. On November 22, 1918, he was temporarily appointed assistant paymaster in the Navy with the rank of ensign, and on November 30, 1918, accepted the appointment and executed oath of office as such. On October 11, 1919, plaintiff attained the rank of lieutenant, junior grade, temporarily, from July 1, 1919, and continued so to serve until July 30, 1921, on which date he was commissioned a regular assistant paymaster in the Navy with the rank of lieutenant, junior grade, from the 1st of July, 1920, being his first appointment to a commissioned grade in the permanent Navy. He accepted this appointment and executed oath of office as assistant paymaster August 8, 1921, with rank of lieutenant, junior grade, from July 1, 1920. On December 21, 1922, he was commissioned a regular past assistant paymaster with the rank of lieutenant from July 4, 1922, and on March 14, 1923, received a commission in the same rank to date from June 3, 1922, and has ever since served as a commissioned officer in the Supply Corps of the Navy in the rank of lieutenant. He had on June 30, 1922, attained a total naval service, enlisted and commissioned, of 15 years, 2 months, and 14 days.

During all the period covered by this claim, from July 1, 1922, to April 23, 1924, plaintiff has been and still is a married officer living with his wife and supporting her.

II. During the period from October 1, 1923, to March 31, 1924, plaintiff was credited with and received the pay and allowances of the fourth-pay period provided by the act of June 10, 1922, during the entire period April 1, 1923, to March 31, 1924. Subsequently, all amounts paid him in excess of the third-pay period were debited against his account and deducted from subsequently accruing pay in the sum of $1,089.60. He has received the pay and allowances of the fourth-pay period only from and after April 23, 1924.

If plaintiff is entitled to the pay and allowances of an officer of the fourth-pay period from July 1, 1922, to April 23, 1924, there will be due him the sum of $1,935.89.

The court decided that plaintiff was entitled to recover.

Opinion of the Court

MOSS, *Judge*, delivered the opinion of the court:

The plaintiff, Robert H. Lenson, enlisted in the Navy February 25, 1907, and served as an enlisted man from that date until May 2, 1918, when he received a temporary appointment as acting pay clerk. On November 22, 1918, he was given a temporary appointment as assistant paymaster in the Navy with the rank of ensign. On October 11, 1919, he attained the rank of lieutenant, junior grade, and continued so to serve until July 30, 1921, on which date he was commissioned a regular assistant paymaster with the rank of lieutenant, junior grade, from July 1, 1920, this being his first appointment to a commissioned grade in the permanent Navy. On December 21, 1922, he was commissioned a regular past assistant paymaster with the rank of lieutenant, and on March 14, 1923, received a commission in the same rank, dating from June 3, 1922, and has since that date continuously served in that capacity. On June 30, 1922, plaintiff attained a total naval service, enlisted and commissioned, of 15 years, 2 months, and 14 days.

Plaintiff claims to be entitled, under the joint service pay act of June 10, 1922, 42 Stat. 625, by reason of his total service of more than 14 years, to receive the pay and allowances of the fourth-pay period from and after July 1, 1922, until April 23, 1924, when he began to receive such pay and allowances by reason of service extending over a period of 17 years.

For a period of more than a year after April 1, 1923, plaintiff was paid as an officer in the fourth-pay period, and in April, 1924, all amounts so paid were checked against and deducted from plaintiff's account by the General Accounting Office. This action is for the recovery of same.

It is provided in the act mentioned that—

"The pay of the fourth period shall be paid to lieutenant colonels of the Army, commanders of the Navy, and officers of corresponding grade who are not entitled to the pay of the fifth or sixth period; to majors of the Army, lieutenant commanders of the Navy and officers of corresponding grade who have completed fourteen years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army, or who

were appointed to the Regular Army under the provisions of the first sentence of said section 24; to captains of the Army, lieutenants of the Navy, and officers of corresponding grade who have completed seventeen years' service, except those whose promotion is limited by law to this grade and who are not entitled under existing law to the pay and allowances of a higher grade; and to lieutenants of the Staff Corps of the Navy, and lieutenants and lieutenants (junior grade) of the line and Engineer Corps of the Coast Guard whose total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period."

It is further provided—

"For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, * * *."

The act of March 3, 1883, 22 Stat. 472, 473, in force at the time of the enactment of the joint service pay act defined "all service which is now counted in computing longevity pay" as follows:

"And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service."

Plaintiff having been a commissioned officer in the service on June 30, 1922, is entitled to count his entire service from the date of his enlistment, a period of more than 15 years, and should recover the amount due him, which is $1,935.89.

In the case of *Hendee* v. *United States*, 124 U. S. 309, which involved the question as to whether or not the period during which plaintiff in that case served as a paymaster's clerk in the Navy should be counted for the purpose of increasing his salary under the longevity provisions of the statutes, it was held that service "as officers or enlisted men" includes all service in the Navy.

Reporter's Statement of the Case

It is the judgment of the court that plaintiff recover herein the sum of $1,935.89.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

ADELAIDE F. CHAPMAN v. THE UNITED STATES [1]

[No. D-204. Decided February 14, 1927; motion for new trial overruled October 24, 1927]

On the Proofs

Income tax; profit from sale of stock issued as dividend and representing increase of capitalization.—Where the plaintiff has received stock issued as dividend and in connection with an increase of capitalization, and sells the stock so issued, her taxable income, derived from the sale, is to be determined by taking as the cost per share of the stock issued as dividend an average obtained by treating the cost of the original purchase as the total cost of the original shares and those issued as dividend. See *John D. Chapman* v. *United States, ante*, p. 106.

The Reporter's statement of the case:

Mr. Sanford Robinson for the plaintiff.

Mr. Charles T. Hendler, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. J. Robert Anderson* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a resident of the town of Greenwich, county of Fairfield, State of Connecticut, and a citizen of the United States.

II. The Bethlehem Steel Corporation, organized under the laws of the State of New Jersey, on January 1, 1917, and until February 17, 1917, had an authorized common stock of a par value of $15,000,000 divided into 150,000 shares of the par value of $100 each, all of which was issued and outstanding. On or about January 23, 1917, the directors voted

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[1] Writ of certiorari granted.

to increase the capitalization of the corporation and in this connection declared a stock dividend of 200 per cent upon said common stock. The shares so issued as a stock dividend have no voting rights, but otherwise have the same rights as the original common stock. These shares are designated class B common stock, and they are hereinafter referred to as class B shares. The original common stock retained its voting rights and was designated and is hereinafter referred to as class A common stock. Afterward and on or about February 17, 1917, the Bethlehem Steel Corporation issued and delivered to stockholders 300,000 shares of said class B stock of the par value of $100 each, totaling $30,000,000, representing the said stock dividend. One hundred shares of said class B stock sold on a "when issued" basis on the New York Stock Exchange on February 17, 1917, at 120½ and another 100 shares sold on the same day at 121. The stock was first listed and traded in on the New York Stock Exchange of February 24, 1917. During the week February 24–March 2, 1917, 15,900 shares were bought and sold upon the New York Stock Exchange at prices ranging from 114½ to 103.

III. Throughout the year 1917 plaintiff owned 1,800 shares of said original common capital stock of the Bethlehem Steel Corporation, which were acquired at an actual cost of $201,151.25 on the dates and in the amounts as follows:

Jan. 18, 1915	300 shares at 52½	$15,787.50
	200 shares at 52¾	10,575.00
	50 shares at 52⅝	2,637.50
Feb. 5, 1915	500 shares at 51⅞	26,000.00
	300 shares at 51¾	15,562.50
	100 shares at 51½	5,162.50
	100 shares at 51¾	5,187.50
	40 shares at 52	2,085.00
Feb. 9, 1915	10 shares at 55¼	553.75
Oct. 29, 1915	200 shares at 588	117,600.00
Total		201,151.25

On or about February 17, 1917, plaintiff received from the Bethlehem Steel Corporation 3,600 shares of class B common

stock of said corporation as her share of the 200 per cent stock dividend. Afterward, before December 31, 1917, plaintiff sold all of the 3,600 shares of said class B common stock so received as a stock dividend and received therefor $371,690.

IV. The net earnings of the Bethlehem Steel Corporation according to the books of account amounted to $27,320,736.86 for the calendar year 1917 and $43,593,968.16 for the calendar year 1916.

V. Plaintiff filed a Federal income-tax return for the calendar year 1917 with the collector of internal revenue at Hartford, Conn., on or about April 1, 1918, in accordance with an extension duly granted, and thereafter and on or about June 15, 1918, paid Federal income taxes amounting to $22,938.09, reported to be due in said return, to said collector of internal revenue. The plaintiff reported said stock dividend in said return as a dividend.

VI. Thereafter and on or about June 26, 1922, an internal revenue agent made a report of his field examination of plaintiff's Federal tax returns for the years 1917 and 1918, and the Commissioner of Internal Revenue by letter dated January 12, 1923, notified the plaintiff that an examination of her income-tax returns and books of accounts and records for the years 1917 and 1918 disclosed an additional tax liability for the year 1917, aggregating $64,199, and an overassessment for the year 1918 amounting to $3.69.

Thereafter and on or about March 21, 1923, the Commissioner of Internal Revenue made an assessment of additional income taxes against plaintiff for the calendar year 1917 amounting to $64,199. On or about May 16, 1923, the collector of internal revenue at Hartford, Conn., notified the plaintiff of such assessment, which additional taxes plaintiff paid to said collector of internal revenue on or about May 25, 1923, under protest. Thereafter and on or about June 12, 1923, plaintiff duly filed claim for the refund of the additional tax so paid, which claim for refund was rejected by the Commissioner of Internal Revenue on or about August 23, 1923.

VII. Said additional assessment was made on the basis of excluding said stock dividend from income as a dividend and computing the profit from the sale of said 3,600 shares of class B common stock on the basis of a cost to the plaintiff of $37.25 per share, which was arrived at by taking the cost ($201,151.25) of the original purchase of 1,800 shares as the cost to the plaintiff of the original 1,800 shares and the 3,600 shares received in the stock dividend.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

The plaintiff, Adelaide F. Chapman, in the year 1917 was the owner of 1,800 shares of the common capital stock of the Bethlehem Steel Corporation, which was acquired on various dates and at different prices in the year 1915, the total cost being $201,151.25. On January 23, 1917, the directors voted to increase the capitalization of said corporation, and in this connection declared a stock dividend of 200 per cent upon the common stock; and on February 17, 1917, plaintiff received from the corporation 3,600 shares of the new stock as her proportion of the stock dividend. Plaintiff reported said stock dividend in her tax return for 1917 as dividend. Thereafter, and before December 31, 1917, plaintiff sold the 3,600 shares received as a stock dividend for the sum of $371,690.

Plaintiff contends that the income resulting from the sale in 1917 of the stock received as a stock dividend in that year was taxable at the rates for prior years under the provisions of section 31 of the revenue act of 1916, as amended by section 1211 of the revenue act of 1917, 40 Stat. 300, 336–337, in which it is provided that in any distribution made by a corporation, whether represented by cash or by stock of the corporation, such distribution shall be considered income to the amount of the earnings or profits so distributed; and plaintiff is suing for the recovery of the additional tax paid amounting to $64,199.

The Government contends, on the other hand, that the income resulting from the sale of the stock received as a

stock dividend was not the receipt of dividend, but was gain or profit derived from the sale of the stock, and that section 31 of the act of 1916 as amended has no application. The Commissioner of Internal Revenue assessed the additional tax on this basis, computing the tax on the difference between the cost of the stock and the amount realized from its sale, properly applying the 1917 rates.

The theory upon which the commissioner proceeded was correct, as determined by the United States Supreme Court in the case of *Towne* v. *Eisner*, 245 U. S. 418; in *Eisner* v. *Macomber*, 252 U. S. 189; and in other cases, in which it was distinctly held that a stock dividend does not constitute taxable income.

The commissioner in computing the cost of the 3,600 shares properly considered the original total cost of the 1,800 shares as representing the total cost of both the 1,800 shares and the 3,600 shares distributed as a stock dividend; and on this basis the commissioner fixed the cost of the 3,600 shares at $37.25 per share, and assessed the additional tax accordingly. The plan adopted by the commissioner in ascertaining the profit was correct. To state the question simply, by the payment of the sum of $201,151.25 plaintiff acquired a capital interest in the corporation, and she received as evidence of that interest 1,800 shares of the original common stock, and without further cost she also received an additional 3,600 shares, or a total of 5,400 shares. Her interest in the corporation was neither increased nor diminished by the later acquisition of the 3,600 shares. It remained precisely the same.

The contention of the plaintiff that the Government is barred by the statute of limitations is not tenable.

It is the opinion of the court that plaintiff is not entitled to recover. It is therefore the judgment of the court that plaintiff's petition be dismissed. And it is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

SEINSHEIMER PAPER CO. v. THE UNITED STATES

[No. D-835. Decided February 14, 1927; motion for new trial overruled May 2, 1927]

On the Proofs

Income tax; determination of salary deductions.—It appearing that the evidence upon which the Commissioner of Internal Revenue acted was sufficient to justify a conclusion that the salaries allowed by him as deductions in plaintiff's corporate income tax return for the year 1917 were not less than the ordinary and necessary expense therefor, and in the returns for 1918 and 1919 were reasonable allowances, plaintiff is not entitled to a refund of taxes based on larger salary deductions.

The Reporter's statement of the case:

Mr. J. Robert Sherrod for the plaintiff. *Mr. John D. Watkins, Miller & Chevalier*, and *Harmon, Colson, Goldsmith & Hoadly* were on the brief.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, the Seinsheimer Paper Company, is and was during the years 1917, 1918, and 1919, a citizen of the United States, being a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and having its principal place of business at Cincinnati, in said State.

II. Plaintiff, on or about March 29, 1918, in accordance with the provisions of the revenue act of 1916, as amended by the revenue act of 1917, and the regulations of the Treasury Department thereunder, and on forms furnished to it by the collector of internal revenue at Cincinnati, Ohio, prepared and filed with said collector returns purporting

to show its income and invested capital for the calendar year 1917, computed in the manner provided in said statutes and regulations, and paid to said collector at the time said returns were filed income and excess-profits taxes on its income for said year amounting to $20,651.18.

On or about December 15, 1919, as the result of an assessment, plaintiff paid to said collector, under protest, additional income and excess-profits taxes on said income for the year 1917 amounting to $26,404.64. The total income and excess-profits taxes which plaintiff paid to said collector on said income for the year 1917, as aforesaid, amounted to $47,055.82.

III. Plaintiff, in accordance with the provisions of the revenue act of 1918 and the regulations of the Treasury Department thereunder, within the time prescribed by said act and regulations, and on forms furnished to it by said collector, prepared and filed with said collector returns purporting to show its income and invested capital for the calendar years 1918 and 1919, computed in the manner provided in said statutes and regulations, and paid to said collector within the time prescribed by said statutes and regulations, income and excess-profits taxes on said income for the year 1918 amounting to $33,948 and on said income for the year 1919 amounting to $2,317.65.

In or about January, 1921, the Commissioner of Internal Revenue assessed against plaintiff additional income and excess-profits taxes for the year 1918 in the sum of $24,720. Plaintiff thereupon filed a claim in abatement of said additional assessment, and thereafter $8,013.73 of the additional assessment was abated by said commissioner, and plaintiff paid to said collector, under protest, the balance of said additional assessment, to wit, the sum of $16,706.27, on or about November 16, 1923, making the total income and excess-profits taxes which plaintiff paid to said collector on said income for the year 1918 amount to $50,654.27.

On or about July 27, 1923, the Commissioner of Internal Revenue assessed against plaintiff additional income and

excess-profits taxes on said income for the year 1919, in the sum of $5,931.38, which plaintiff paid to said collector, under protest, on or about November 16, 1923, making the total income and excess-profits taxes which plaintiff paid to said collector on said income for the year 1919 amount to $8,249.08.

IV. The plaintiff in making its income-tax return for the years 1917, 1918, and 1919, deducted $75,000 for each of said years as total salaries paid to its three officers in each year, $25,000 having been paid to its president, A. H. Seinsheimer; $25,000 to its vice president, L. A. Seinsheimer; and $25,000 to its secretary and treasurer, Walter Seinsheimer, during each of the years in question.

V. The three officers to whom the above salaries were paid were during the years 1917, 1918, and 1919, the owners of all the outstanding capital stock of the plaintiff company. A. H. Seinsheimer, president of the company, is the father of the other two officers.

VI. In the year 1916 the same officers served the company as in the years 1917, 1918, and 1919. The total salaries paid to these three officers for 1916 amounted to $16,000, $6,000 having been paid to the president and $5,000 to each of the other two officers. It was customary for the company at all annual meetings to agree upon the officers' salaries to be paid during the current or ensuing year. The minutes of such a meeting held in January, 1917, show that it was agreed that the same salaries should be paid for the year 1917 as were paid in 1916. The minutes of the special meeting of stockholders held September 24, 1917, show that it was agreed that the salary of each of the three officers named should be increased for the year 1917 to $25,000. In carrying out that agreement a credit of $15,000 was set up in favor of each officer upon the closing of the books at the end of the year.

VII. The following table shows the net income reported by the plaintiff for the years 1916, 1917, 1918, and 1919, the salaries paid to each of the three officers in each year, and

the amount of capital stock owned by each officer during each year:

	1916	1917	1918	1919
Income	$152, 164. 35	$75, 569. 38	$68, 220. 36	$25, 176. 53
Officers' salaries:				
A. H. Seinsheimer, president	6, 000. 00	25, 000. 00	25, 000. 00	25, 000. 00
Louis A. Seinsheimer, vice president	5, 000. 00	25, 000. 00	25, 000. 00	25, 000. 00
Walter Seinsheimer, secretary and treasurer	5, 000. 00	25, 000. 00	25, 000. 00	25, 000. 00

STOCK HOLDINGS

	All years	All years	Prior to June 5, 1918	After June 5, 1918	Prior to Jan. 6, 1919	After Jan. 6, 1919
A. H. Seinsheimer	480	450	450	570	570	30
Louis A. Seinsheimer	135	150	150	190	190	460
Walter Seinsheimer	135	150	150	190	190	460

VIII. During the year 1917 and the period from January 1, 1918, to June 5, 1918, plaintiff corporation was affiliated, as provided by the regulations and rulings of the Treasury Department, and section 240 of the 1918 act, with the Seinsheimer Realty Company, an Ohio corporation, and during said time the three officers of plaintiff corporation were also officers of the Seinsheimer Realty Company, but did not receive any compensation for their services as officers of the latter company during said time.

The Seinsheimer Realty Company was organized and served only as a holding company. It held title during 1917, 1918, and 1919 to the real estate occupied by the plaintiff company.

IX. On or about November, 1920, the commissioner notified the plaintiff that there had been allowed as a deduction from the plaintiff's gross income for the year 1917, as salary paid to officers only $45,000 of the $75,000 deducted by the plaintiff. The additional assessment of $24,720 referred to in Finding III, was based on said disallowance.

On or about December 15, 1922, said commissioner notified plaintiff by letter that its income and excess-profits tax liability for the years 1917, 1918, and 1919 had been deter-

mined, and that pursuant to a conference had with plaintiff's representative a total deduction from gross income for each of said years in the sum of $50,000 had been allowed on account of salaries paid its officers. A copy of said letter is attached to the petition herein as Exhibit 1, and is by reference made a part of this finding. Plaintiff thereupon appealed to said commissioner and the committee on appeals and review, his appellate body, as provided by section 250 of the revenue act of 1921, but was notified by letter on or about July 27, 1923, that said appeal, in so far as it related to salaries paid to officers, had been disallowed. A copy of said letter is attached to the petition filed herein, as Exhibit 2, and is by reference made a part of this finding.

X. The additional income and excess-profits taxes which plaintiff was required to pay as aforesaid as the result of the disallowance each year of $25,000 of the total amount of $75,000 which plaintiff paid to its officers during each of the years 1917, 1918, and 1919, amounted to $12,038.17 for the year 1917, $21,061.03 for the year 1918, and $6,094.15 for the year 1919, or a total amount of $39,193.35.

XI. On January 11, 1923, plaintiff executed and thereafter filed with said commissioner, at his request and as provided by subdivision (d) of section 250 of the revenue act of 1921, an income and excess-profits tax waiver for the year 1917 of the statute of limitations as to additional assessments for the year 1917.

XII. Claims for refund were duly filed within the time required by law for all amounts claimed in this action and all of said claims were rejected by the commissioner prior to and within two years of the commencement of this action.

XIII. The said sum of $39,193.35, which was paid by plaintiff as and for a tax as aforesaid, was received and is still retained by the United States.

XIV. The Commissioner of Internal Revenue disallowed the said deductions in plaintiff's income and excess-profits tax returns for the calendar years 1917, 1918, and 1919 on the ground that a total salary allowance of $75,000 per year for the said officers was unreasonable, and that a reasonable

allowance for said salaries was a total of $50,000 per year. In arriving at his decision the commissioner gave full consideration to all facts bearing upon the question of a reasonable allowance.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

In its income-tax returns for the years 1917, 1918, and 1919 the plaintiff, the Seinsheimer Paper Company, deducted $75,000 for each of said years as total salaries paid to its three officers, $25,000 a year to each of them. The officers of plaintiff company consisted of the father and his two sons, who were the sole owners of the outstanding capital stock of the company and whose total salaries for the year 1916 and years prior thereto was $16,000.

The Commissioner of Internal Revenue in computing the net income of plaintiff disallowed as a deduction the sum of $75,000 per year as total salary, and allowed a total salary of $50,000 for each of the three years. As a result of the disallowance the commissioner assessed additional income and profits taxes for the three years involved, amounting in the aggregate to $39,193.15, and this action is for the recovery of that sum.

Section 12 (a), act of 1916, 39 Stat. 756, provides as follows:

"In the case of a corporation * * * such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources, first, all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties * * *."

Under this statute, which is applicable to the 1917 taxes, salaries of officers were allowed as deductible items under proper Treasury regulations.

The revenue act of 1918 applicable to the taxes for 1918 and 1919 provides that in computing net income "all the ordinary and necessary expenses * * *, including a reasonable allowance for salaries, are deductible."

The ground upon which the commissioner disallowed the deduction of $75,000 per year for salaries was that same was

an unreasonable amount; and he allowed a deduction of $50,000 as being a reasonable sum for such salaries.

The sole question, therefore, is whether or not the $50,000 allowed as a deduction by the commissioner constituted a reasonable salary.

The Commissioner of Internal Revenue under the law is charged with the duty of assessing the tax on net income, and in order to arrive at net income it is likewise his duty to consider and determine the question of proper allowable deductions.

It clearly appears from the record that, in reaching his conclusion as to the reasonableness of the allowance made by him, the commissioner gave full consideration to all facts bearing upon the question; and in addition to the facts appearing in the record he considered also certain information contained in the files of his office concerning salaries allowed as deductions to officers of companies doing a similar business, comparable in amount of invested capital and in volume of business.

The court is of the opinion that the evidence upon which the commissioner determined that a total salary of $50,000 was reasonable was sufficient to justify such conclusion.

It is therefore the judgment of the court that plaintiff's petition should be and the same is hereby dismissed.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

On motion for new trial

MOSS, *Judge*, delivered the opinion of the court:

The Commissioner of Internal Revenue in computing the net income of plaintiff disallowed as a deduction the amount claimed by plaintiff, $75,000 per year as total salary, and allowed the sum of $50,000 for each of the years involved, 1917, 1918, and 1919.

Section 12 (a), act of 1916, 39 Stat. 756, applicable to the tax for the year 1917, provides that in computing net income "all the ordinary and necessary expenses * * *" are deductible.

Section 234 (a), of the act of 1918, 40 Stat. 1057, 1077, applicable to the tax for the years 1918 and 1919, provides that in computing net income "all the ordinary and necessary expenses * * * including a reasonable allowance for salaries * * *" are deductible.

The entire stock of plaintiff company was owned by A. H. Seinsheimer, the father, and by his sons, Louis A. and Walter Seinsheimer, and these three constituted the officers and active managers of the business of the company.

From the year 1900 to 1916, inclusive, A. H. Seinsheimer, the president of the company, received a salary of $6,000 per year, except for two years, 1910 and 1913, when he was paid $7,000 and $8,000, respectively. For the same period the two sons each received an average of $5,000 per year as salaries. Approximately, therefore, from 1900 to 1916, inclusive, the aggregate annual salaries paid amounted to $16,000, in the proportions above set forth. In and for the year 1917 these officers increased their salaries to $25,000 each per year. It was an increase of more than 386 per cent.

Salaries of officers to be deductible under the 1916 act must come within the classification of "ordinary and necessary" expenses incident to the maintenance and operation of the business, and like all other items of expense such salaries must be "ordinary and necessary" salaries. The term "ordinary" as used in the statute means customary or usual. No extrinsic evidence is needed in this case to establish what might properly be regarded as the ordinary, customary, or usual salary pertaining to the business of plaintiff company. The officers themselves by their own course, extending over a period of sixteen years, leave no room for question on that point. The record, however, discloses an abundance of evidence on the question.

Plaintiff's motion is based on a recent decision of this court in the case of *Botany Worsted Mills* v. *United States*, *ante*, p. 405.

In that case it appeared that on January 11, 1890, the plaintiff company incorporated in its by-laws a certain provision for the compensation of its directors by which they were to receive, in addition to a nominal salary, a designated

Opinion of the Court

percentage of the net income. The percentage was changed from time to time, but from the year 1908 until after the close of the taxable year 1917 the directors had received annual payments under the express provision of the by-laws a sum equal to 32 per centum of the net income. Each director held a position as an executive officer or manager of a certain department of the business. This method of compensation was consistently followed for nearly thirty years, during which time the gross assets of plaintiff company had increased from $1,114,149.63 in 1890 to $28,893,777.12 in 1917; and its net assets, including reserves, had increased from $37,136.35 in 1890 to $10,999,862.48 in 1917. It was also shown that such method of compensating directors and officers had been the practice in many corporations engaged in the woolen manufacturing business. The court was of the opinion that the payment of such compensation for the year 1917 constituted one of the "ordinary and necessary expenses" of the operation of the business, and that the Commissioner of Internal Revenue was without authority under the act of 1917 to determine the question of the reasonableness of a claim for deduction for salary. However, in the *Botany case* the Government interposed as one of its defenses an alleged settlement in the Internal Revenue Bureau of all tax matters between the taxpayer and the Government, which the court sustained, and the petition was dismissed on that ground.

In this case the tax for three years was involved. For two of the years, 1918 and 1919, the commissioner was expressly authorized to deduct a *reasonable* allowance for salaries. For one of the years, 1917, his authority was limited to the inquiry as to whether or not the salary came properly within the term "ordinary and necessary" expenses. The fact that the Commissioner of Internal Revenue in disallowing a portion of plaintiff's claim employed the use of the term "reasonable" as applying to the whole case; or that the court used the word "reasonable" in stating the question to be "whether or not the $50,000 allowed as a deduction by the commissioner constituted a

reasonable salary" is beside the question. The facts, rather than the technical use of terms, must control. The salary claimed by plaintiff is neither an ordinary and necessary expenditure under the meaning of the act of 1916, nor is it a reasonable salary as contemplated by the terms of the act of 1918.

Plaintiff's contention concerning the years 1918 and 1919 is not seriously urged.

It is the opinion of the court that plaintiff's motion for new trial should be overruled, and it is so ordered.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

HARRY F. WAITE v. THE UNITED STATES

[No. B-129. Decided May 2, 1927]

On the Proofs

Patents; X-ray system.—The invention of an X-ray system, covered by Letters Patent 1343599 issued to Waite, *held* valid and infringed.

Same; automatic clamp for bracket supports.—The claim made in Letters Patent 1371011 issued to Waite for automatic clamp for bracket supports, *held* anticipated by prior art.

Same; vertical fluoroscopic unit.—The claim made in Letters Patent 1420395 issued to Waite for vertical fluoroscopic unit, *held* anticipated by prior art.

Same; new application of old combination.—Securing a new and unique application of power in a way not theretofore done or suggested, by the use of an old combination, is patentable invention.

The Reporter's statement of the case:

Mr. O. Ellery Edwards for the plaintiff. *Mr. Joseph W. Cox* was on the briefs.

Mr. John S. Bradley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Harry E. Knight* was on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff is a citizen of the United States, residing in the State of New York. He is the president and active managing head of the Waite & Bartlett Manufacturing Co., a corporation duly organized under the laws of the State of New York, and owns the controlling interest therein. This company is and was his exclusive licensee under his patents here in suit since their issue dates.

II. On October 6, 1917, the plaintiff filed in the United States Patent Office an application for letters patent on certain stated improvements in X-ray systems. Upon this application letters patent No. 1343599 were issued to him June 15, 1920, and the title to the patent therein allowed remains in him. A copy of the file wrapper and contents is in the case as defendant's Exhibit No. 6 and is by reference thereto made a part of this finding. A copy of the specifications of said letters patent with annexed drawing is attached to these findings as Appendix No. 1 and made a part hereof by reference.

III. At the time the said application for letters patent was filed there were in the art prior thereto inventions or systems disclosed by the following patents and publications, hereby made a part of these findings by reference:

United States patent 1012326, December 19, 1911, electrotherapeutic apparatus, to Campbell.

United States patent 1122011, December 22, 1914, process and apparatus for producing Roentgen rays, to Lilienfeld.

British patent 7869, A. D. 1915, published January 13, 1916, improvements in or relating to Röntgen tube apparatus, to Burdon.

United States patent 1182291, May 9, 1916, rectifier, to Meikle.

United States patent 1195632, August 22, 1916, circuit connections of electron-discharge apparatus, to White.

United States patent 1203495, October 31, 1916, vacuum tube, to Coolidge.

United States patent 1211091, January 2, 1917, cathode ray device, to Coolidge.

Reporter's Statement of the Case

Article on Tungar rectifier, General Electric Review of March, 1917.

In the same art there were also the following patents granted on applications filed before October 6, 1917:

United States Patent 1291379, January 14, 1919, thermionic converter, to Birdsall.

United States Patent 1250731, December 18, 1917, X-ray system, to Waite (plaintiff herein).

Prior to the granting and issuing of the said Waite patent No. 1343599 the type of X-ray systems which had been in use or were in use were as follows:

1. The induction coil system using a gas tube. This is the first X-ray system which has been used since 1895.

2. The induction coil system was followed by the Snook system shown in the Snook patent No. 954056 of April 5, 1910. This also used a gas tube.

3. A later advance in the art, of great importance, was the introduction of the Coolidge tube shown in the Coolidge patents No. 1203495, No. 1211091 and No. 1326029 and plaintiff's Exhibit 25. Here a vacuum in the tube was made much higher than any before in use, and no reliance was placed on the atmosphere in the tube for X-ray generation, a hot cathode heated by an independent current being relied upon for the purpose of electron discharge. This tube employed a special cathode heating current and means for supplying the same which means was either a step-down transformer or a storage battery. This tube was supplied with an X-ray generating current from a step-up transformer which was separate from the step-down transformer or storage battery, but connected thereto so that both were charged with high potential. This Coolidge tube came into use in 1913.

None of these prior art structures was used in the advanced hospitals and dressing stations during the World War near the firing line.

Copies of the specifications and drawings annexed thereto of the foregoing nine patents and copy of said article on the Tungar rectifier are attached to these findings and designated Appendix No. 2.

IV. The claim made and allowed in said Letters Patent No. 1343599 is stated therein by the plaintiff as follows:

"An X-ray system composed of an X-ray tube with a hot cathode and an anode, a transformer unit with a single primary and a secondary composed of two sections, one having a few turns of coarse wire suitable for the cathode heating current, and the other having many turns of fine wire suitable for the X-ray generating current, three wires connecting the X-ray tube and the secondary, two of which connect the coarse wire with the hot cathode and one of which connects the fine wire with the anode, and means for supplying the primary with a suitable electric current."

V. On August 10, 1920, the plaintiff filed in the United States Patent Office an application for letters patent for an automatic clamp for bracket supports, upon which application letters No. 1371011 were issued to him on March 8, 1921. The title to this patent remains in him. A copy of the specifications thereof and annexed drawings is attached to these findings as Appendix No. 4.

VI. At the time of the filing of said application August 10, 1920, there were in the art prior thereto the following United States patents:

No. 375031, December 20, 1887, fire escape, to Westbrook.

No. 833167, October 16, 1906, lamp stand, to Hughes.

No. 902949, November 3, 1908, scaffold, to Dibler.

No. 1174051, March 7, 1916, harness hook, to Buland.

Copies of the specifications and annexed drawings, of the foregoing four patents, are attached to these findings as Appendix No. 5.

VII. The claims made by the plaintiff and allowed in Letters Patent No. 1371011, for automatic clamp for bracket supports, are as follows:

"1. A device of the class described, a vertically disposed spindle, a pair of forks with rollers mounted therein, means for holding said forks in rigid relation to each other, a clamp having two parts, springs adapted to separate said parts, a lever with cams adapted to bring said parts together, and a spring stronger than the springs separating the clamp, which is adapted to actuate the lever and cause it to force the two parts of the clamps toward each other.

"2. A device of the class described, a vertically disposed spindle, a pair of forks with rollers mounted therein, means

for holding said forks in rigid relation to each other, a clamp having two parts, springs adapted to separate said parts, a lever with cams adapted to bring said parts together, and a spring stronger than the springs separating the clamp, which is adapted to actuate the lever and cause it to force the two parts of the clamps toward each other, and means for counterbalancing the weight of the forks and connected parts which move with them."

VIII. The device made by the Wappler Electric Co. under the contract mentioned in Finding XIV, for holding in place the bracket support on which was to be mounted the X-ray tube, was of the kind and character described in Letters Patent No. 1371011, issued to the plaintiff, with the following differences: There were no springs adapted to separate the two parts of the clamp; in the place of cams the lever was provided with toggles which were adapted to separate the said parts of the clamp as well as bring them together, and had a spring of indefinite strength, which was adapted to actuate the lever and cause it to force the two parts of the clamps toward each other. This device is illustrated by plaintiff's Exhibit 13, made a part of this finding by reference.

IX. On November 20, 1920, the plaintiff filed in the United States Patent Office an application for letters patent for a vertical fluoroscopic unit. Upon this application Letters Patent No. 1420395 were granted June 20, 1922, and the title to the patent remains in the plaintiff. A copy of the specifications and drawing annexed thereto is attached to these findings as **Appendix No. 6.**

X. At the time of the filing of said application, November 20, 1920, there was in the prior art the invention shown by United States Letters Patent No. 1285283, for Röntgenoscope, issued November 19, 1918, to McClintock. A copy of the specifications and drawings thereto annexed of the McClintock patent is attached to these findings as Appendix No. 7.

XI. The claims made by the plaintiff and allowed by the Commissioner of Patents in said Letters Patent No. 1420395 for vertical fluoroscopic unit are as follows:

"1. In a device of the class described, a hot cathode tube for generating X-rays, a fluoroscopic screen adapted to receive said rays, means for causing the fluoroscopic screen and

Reporter's Statement of the Case

X-ray tube to be raised or lowered together or be supported in a stationary condition at the same level, a control for regulating the quantity of X-ray generation which extends adjacent to the screen and which is supported by the means for supporting the X-ray generating tube.

"2. In a device of the class described, a fluoroscopic screen and means for supporting the same, an X-ray tube adjacent to said screen and means for supporting the same, means for keeping the screen and X-ray tube at corresponding levels, a rheostat carried by said tube supporting means and a rheostat regulating means carried by said tube supporting means with a part always adjacent to said screen whereby the quantity of X-ray generation may be controlled by an operator holding the screen and without moving his body."

XII. The device made by the Wappler Electric Co. under the contract mentioned in Finding XIV for a fluoroscopic unit was of the kind and character described in Letters Patent No. 1420395, issued to the plaintiff.

XIII. During the war with Germany the plaintiff conversed with John S. Shearer in the interest of the defendant with regard to some sort of a portable X-ray apparatus for the Army, and this occurred right after Lt. Col. John S. Shearer was appointed at the school of instruction, Cornell Medical School, New York City, New York. Colonel Shearer was an eminent scientist temporarily in the employ of the United States Army. Doctor Waite and Colonel Shearer talked over the various types of apparatus that were available at that time, but there were none such as Colonel Shearer felt were required for overseas Army service, so that Doctor Waite thereafter conducted a series of experiments with a view to making an apparatus that would fill Colonel Shearer's requirements, and the system of the patent in suit No. 1343599 is the result of Doctor Waite's experimental work. Colonel Shearer approved this system. A number of such units were manufactured by the Waite & Bartlett Manufacturing Co. and delivered to the United States Army during 1917 and 1918 upon contracts with the defendant. Colonel Shearer knew of the application from which this patent developed as early as November 4th, 1919.

XIV. On June 28, 1921, the Wappler Electric Co. entered into a contract with the United States to furnish and deliver thereto, among other things, 50 fluoroscopes, vertical, United

States Army type; 50 transformers, improved bedside type; and 50 universal X-ray units, at $249, $97, and $399 each, respectively, all to be according to specifications which were attached to and made a part of the contract, and which provided that said articles were "to be constructed as per standard sample on exhibit at Cornell University, Ithaca, N. Y."

The contract also provided as follows:

"Article IX. The contractor will hold and save the United States, its representatives, and all other persons acting for its agent, contractor or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in the making or supplying of the articles or work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, and if and when required, will discharge and secure the United States from all demand or liability on account thereof by proper release from the patentees or claimants, but if such release is not practicable, then by bond or otherwise, and to the satisfaction of the Surgeon General of the Army."

A certified copy of the aforesaid contract is filed as defendant's Exhibit 27 and is made a part of this finding by reference thereto.

XV. Work upon the contract was immediately started by the Wappler Electric Co. and delivery of the finished articles described therein completed on or about June 15, 1922. The transformer made thereunder by the Wappler Electric Co. is described as follows:

A single primary winding is carried on a suitable core and adapted to be traversed by the ordinary 110-volt alternating current. Wound upon this primary are two secondary coils, each composed of many thousand turns of fine wire, said secondary coils being connected in series and constituting in effect a single secondary winding, the number of turns of the secondary winding being proportioned to give the desired high voltage for the X-ray generating current. For generating the heating current two separate and distinct coils are used, each composed of a few turns

of relatively coarse wire, wound upon the secondary coils, and are known in the art sometimes as tertiary coils. One of the tertiary coils is used at a time, the other being held in reserve in case of a breakdown.

The said transformer is illustrated in Appendix No. 3 to these findings.

XVI. After the war was over, the Surgeon General's Office appointed Lieut. Col. Shearer to use his knowledge in the developing, for field service work, apparatus that would be an improvement, if possible, over the defendant's equipment at that time. Dr. Waite was asked by the Surgeon General's Office whether he would be willing to work with Col. Shearer in the perfecting of such equipment and this Dr. Waite agreed to do. He designed, built, and submitted to Col. Shearer apparatus which, in the opinion of Dr. Waite, conformed to Col. Shearer's requirements. Col. Shearer told Dr. Waite what he would like to do, and Dr. Waite's part consisted in designing and making apparatus that would fulfill the defendant's requirements to the best advantage. Within the course of this work Dr. Waite designed a special clamping device for the tube stand which prevented the tube from falling due to any carelessness on the part of the operator. Dr. Waite applied for a patent upon this device and this developed into a patent which is patent in suit, plaintiff's Exhibit No. 2, No. 1371011. Col. Shearer was fully informed as to this patent and the application from which it developed.

XVII. The device described in Letters Patent No. 1420395, applied for November 20, 1920, granted June 20, 1922, was designed by the plaintiff independently of his Army work.

XVIII. In October, 1920, the Waite and Bartlett Manufacturing Co. completed the making of a sample X-ray outfit of the kind and character determined by the plaintiff and shipped the said outfit to Lieut. Col. John S. Shearer, at Cornell University, Ithaca, New York. This outfit consisted of two transformers, one vertical fluoroscope, one bedside unit, a photograph of which is in evidence as

plaintiff's Exhibit 21, which is made a part hereof, by reference, and certain other articles not necessary to enumerate here. These devices constituted the samples which were copied in the later manufacture of the Wappler apparatus and were the samples referred to in the contract specifications as the "standard samples" on exhibit at Cornell University, Ithaca, N. Y. (Finding XIV.) Col. Shearer had nothing to do with the designing or manufacturing of these samples, further than set forth in Findings XV and XVI. He had the power to accept or reject the same and he elected to accept them.

XIX. About two months before the defendant sent out its proposals for bids the plaintiff knew that the said devices shipped to Lieut. Col. Shearer, at Ithaca, were to be the basis of Government contracts for quantity manufacture of X-ray outfits. Prior to that time plaintiff did not know that the Government would use this apparatus.

XX. On June 16, 1921, the defendant issued its proposal for bids for the manufacture and delivery of the said outfits. The Wappler Electric Co. and the Waite & Bartlett Manufacturing Co. were among those receiving the proposals. In order that the Wappler Electric Co. might make an intelligent bid it was necessary for its agent to go to Ithaca, since the specifications were not fully disclosed in writing in the proposal, but had to be ascertained from the said samples manufactured by the Waite & Bartlett Manufacturing Co. and on exhibition at Ithaca as aforesaid. The vice president of the Wappler Electric Co., Charles Fayer, inspected the sample apparatus there, was informed by the said Shearer that it was developed in his laboratory for the United States Army, and did not know and was not informed that it had been manufactured by the Waite & Bartlett Manufacturing Co. or had in any measure been designed by the plaintiff. There was nothing on the apparatus to indicate the name of the manufacturer or that letters patent thereon had been applied for or allowed, and the said Fayer did not know of any such patent or application therefor. Such marks were ordered on each apparatus. Why they did

not appear is not disclosed. Col. Shearer, who was acting for the United States, knew of plaintiff's patent and was fully acquainted with the plaintiff's rights.

XXI. The bids were opened in due course, and it was found that the Wappler Electric Co. had underbid the other bidders, including the Waite & Bartlett Manufacturing Co. Mr. Holman, secretary of the Waite & Bartlett Co., was present and made a memorandum from the several bids. The contract was thereafter awarded to the Wappler Electric Co.

XXII. After the said contract had been entered into between defendant and the Wappler Electric Co. June 28, 1921, the following correspondence passed between the said company and the Waite & Bartlett Manufacturing Co.:

JANUARY 12, 1922.

WAPPLER ELECTRIC CO.,
Long Island City, N. Y.

GENTLEMEN: We understand that you are infringing the following patents: 1343599, 967469, 1371011, 1400333.

We might also call your attention to the fact that we have an application pending on the mounting of the filament control on the same carriage with the tube and arranged so that it can be controlled same as the shutter is controlled.

Yours very truly,

WAITE & BARTLETT MANUFACTURING CO.

Dr. HFW:MEM.

FEBRUARY 4, 1922.

Registered mail.

WAITE & BARTLETT MFG. CO.,
53 Jackson Avenue, Long Island City.

GENTLEMEN: This is in reply to your letter of January 12th.

Will you kindly give us specific instances in which we are supposed to be infringing upon the four patents mentioned in your letter and oblige,

Very truly yours,

WAPPLER ELECTRIC CO. (INC.).

(Signed) A. MUTSCHELLER.

Dr. AM/ER.

FEBRUARY 6, 1922.

Registered.
WAPPLER ELECTRIC CO.,
162–184 Harris Avenue, Long Island City, N. Y.
Attention Dr. A. Mutscheller.

DEAR SIR: In reply to your letter of February 4th would say, that you have accepted a contract with the Government to deliver vertical fluoroscopes and the new model U. S. Army bedside unit.

Patent 1343599 covers the specified construction of the transformer to be used in the Bedside. Patent 1371011 covers the automatic clamp on the tube stand. Patents 1400333 and 967469 cover the vertical fluoroscope.

We also desire to call your attention to the fact, that your portable X-ray outfit infringes our patent 1277003.

Yours very truly,
WAITE & BARTLETT MFG. COMPANY.
Dr. HFW:MEM.

JUNE 23D, 1922.

WAPPLER ELECTRIC CO.,
Harris Avenue, Long Island City.

GENTLEMEN: I call your attention to my following patents: Nos. 1343599, 1371011, 1400333, 1420395.

Yours very truly,
WAITE & BARTLETT MFG. CO.
Dr. W.-B.

JULY 5, 1922.

Dr. HARRY WAITE,
C/o Waite & Bartlett Mfg. Co.,
53 Jackson Ave., L. I. City.

DEAR SIR: We have received your letter of June 23d, in which you call our attention to some patents. We are asking our attorney to look into this matter, as it is not our intention to infringe anyone else's patents.

Thanking you for the information given, we are
Very truly yours,
WAPPLER ELECTRIC CO. (INC.).
A. MUTSCHELLER.
Dr. AM, HG.

XXIII. The following statement of facts has been stipulated between the parties to this suit by their attorneys, signed on behalf of the plaintiff by O. Ellery Edwards and

on behalf of the defendant by Robert H. Lovett, Assistant Attorney General, and is adopted by the court as part of its special findings of fact herein:

"1. That the mechanisms incorporated in the 'standard samples' referred to in contract between the United States and the Wappler Electric Company, dated June 28, 1921, defendant's Exhibit 27, were bought and paid for by the United States.

"2. That the fifty universal X-rays units, commonly referred to as 'bedside units,' were upon receipt by the United States from the manufacturer, the Wappler Electric Company, unpacked, completely assembled, tested to ascertain that they were in operative condition, and then immediately disassembled and repacked, and, with the exception of one unit, are still in storage in disassembled condition.

"3. That one of said bedside units was later shipped to the Army Medical School at Walter Reed Hospital, where it was assembled and tested for about one month to determine its suitability for Army requirements. Although it operated satistfactorily up to its limitations, a more powerful apparatus was considered more suitable. Therefore, it has not been used since the month of test referred to, save for occasional operations in connection with the instruction of students at the school.

"4. That the fifty fluoroscopes referred to in said contract between the United States and the Wappler Electric Company were received by the United States in a disassembled condition from the manufacturers and, with the exception of one, have never been unpacked, the transformers thereof being simply removed from their packing cases, tested to ascertain that they were in operative condition and then immediately repacked. They have remained in storage dissembled ever since with the exception of the one fluoroscope already referred to.

"5. That one of the said fluoroscopes was later shipped to the Army Medical School at Walter Reed Hospital, where it was assembled and tested. With the exception of this test this fluoroscope has been used only two or three times while repairs were being made to the hospital, when it was more convenient to use it than the regular equipment."

XXIV. Prior to the plaintiff's operation of the system of his patent in suit No. 1343599, it was the belief of persons skilled in the art that the tube of such system would burst if a high potential current, suitable for generating X rays,

were turned on simultaneously with the cathode heating current.

The court decided that plaintiff was entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

This is a patent suit. Infringement is alleged. The defense relied upon goes exclusively to invalidity of the patent and nonuser. The patent is No. 1343599, issued to Harry F. Waite on June 15, 1920. The patent was allowed upon a single claim, as follows: An X-ray system composed of an X-ray tube with a hot cathode and an anode, a transformer unit with a single primary and a secondary composed of two sections, one having a few turns of coarse wire suitable for the cathode heating current and the other having many turns of fine wire suitable for the X-ray generating current, three wires connecting the X-ray tube and the secondary, two of which connect the coarse wire with the hot cathode and one of which connects the fine wire with the anode, and means for supplying the primary with a suitable electric current.

An intelligent discussion of the conception of the inventor involves a review of antecedent conditions which inspired the effort and point out what the inventor was trying to do and what he did. X-ray systems are old, their purpose long since disclosed; but notwithstanding their age, a necessity existed for an X-ray system so constructed as to be easily portable and available for use as a bedside unit and behind the lines in time of war. Lt. Col. John S. Shearer was an eminent scientist. During the war he was appointed to the School of Instruction, Cornell Medical School, New York City. Colonel Shearer was deeply interested in securing a type of X-ray system available for use by the Army. The plaintiff and Colonel Shearer discussed the question and as a result the plaintiff conducted a series of experiments looking toward the construction of a unit capable of Army use as the urgent needs of the time required. The difficulty to be overcome in existing systems was the obviation of cumbersomeness. If a new system was to be evolved, its utility revolved about a reduction of parts, a simplification in construction, and a material reduction in weight and

cumbersomeness. Without going into the scientific causes or factors essential to produce X rays, it is sufficient for the case to limit observations in this respect to the operation of the Coolidge tube. The functioning of the indispensable element is the supplying of electric current to the Coolidge tube. In the old system the flow of electric current into and through the Coolidge tube was accomplished by *two* transformers, one of which supplied low current to the cathode and the other high voltage to the anode. The Coolidge tube exacts a low-voltage current to heat to incandescence the cathode end of the tube and an extremely high voltage for the anode end to generate X rays. This current, as previously observed, was supplied through the medium of two distinct transformers, one of which reduced or stepped down the flow of electric current and the other stepped it up.

The plaintiff conceived the idea of a single transformer capable of doing what had theretofore required two. He combined the mechanism into a single simple unit capable of easy transportation and thereby enabled the creation of an X-ray device susceptible to use wherever ordinary electric current was available. This he did by a simplification of the theretofore double system of transformation of current employed to generate X rays by the use of the Coolidge tube. True, his transformer is simple, and no claim is made for a basic patent of transformers. The claim is essentially a system patent, and the novelty of the invention is its adaptability to this single type of X-ray system employing the Coolidge tube. Instead of employing in separate units a winding of comparatively heavy wire to step down electric current and a winding of a large quantity of very fine wire to step it up, the plaintiff accomplished the same result by adding a few turns of coarse wire to the secondary of his step-up transformer, so that the secondary thereafter became double in its function—i. e., the plaintiff wound around the exceedingly fine wire used to step up the current a few turns of coarse wire to step it down, thus producing a single unit transformer of comparatively small dimensions and weight. What did this accomplish? It materially reduced, if it did not entirely eliminate, the tension dangers to an attendant

operating the mechanism by means of the second separate step-up transformer. It simplified the wiring system theretofore employed and reduced to three in number the wires essential to operate the tube, and as a final and most important result brought into being a compact and portable device capable of easy transportation and reliably available at any place or point where electric current is generated. It made the Coolidge X-ray system available as an X-ray unit behind the lines in the war, and it enabled the use of the system as a bedside unit.

The defendant does not dispute that the Waite transformer is simple, reliable, practical, safe, portable, and sufficiently powerful, claims made for it by the inventor. Neither is it contended that its use in an X-ray system is not new. The defendant challenges the validity of the patent, insisting that it is devoid of novelty. Transformers, it is said, are old. This is true. Their manner of functioning and purpose in use were well known. This too is true. From these statements the defendant deduces the conclusion "that if one wanted to make a transformer from the secondary of which is to be obtained a current of much lower voltage than that of the primary and also a current of much greater voltage than that of the primary, and if it was desired to keep the transformer as small as possible, it would be accomplished by winding the secondary first with the number of turns required for the low step-down voltage, using heavy wire because of the unavoidable increase in amperage * * *. Such transformers have been made and used for many years." In other words, Waite's application of a single and simple transformer to an X-ray generating tube of the Coolidge type was one suggesting itself to anyone skilled in the art and involves mechanics, not invention. A short answer is found in the demonstrated fact that, notwithstanding the Coolidge X-ray system was old, no one prior to Waite did what might have been done.

Keeping in mind that the plaintiff's patent is limited to the single system described, and claims no novelty except as a functioning element of the system, is it impossible for one to claim invention for embodying elements old in the

art which, notwithstanding their known status in the scientific world, when applied to a system in a new way never theretofore adopted, enabled the use of the system to be expeditiously and safely made available for its designed creation in a way not theretofore employed? The defendant concedes that a combination of old elements into a new machine producing a new mode of operation is patentable. What is condemned in plaintiff's patent, both in the brief and testimony of defendant's expert, is that the process of stepping up and stepping down electric current by the use of fine and coarse wires would in primary and secondary windings in a single transformer accomplish nothing new. The plaintiff does assert to the contrary. The plaintiff found an X-ray system employing the wonderful invention of Doctor Coolidge; i. e., the Coolidge X-ray cathode tube. Electric current was supplied to the tube by means of *two* separate and distinct transformers, one to step down, the other to step up, the necessary voltage. It was, of course, in use and served a most important purpose in the medical and scientific world; but it was not adapted for use in the Army. It was cumbersome and incapable of sudden removal from place to place. The wiring was complicated, the separate units employed were heavy and detached. The Army of the United States wanted a portable system; no thought of discarding the Coolidge tube prevailed; no possibility of eliminating the factors indispensable to generate X rays. Something was to be done to preserve intact the X-ray system, but simplifying the mechanism and make it available where it had not been universally or uniformly available before. This is what the plaintiff did. He took the elements old in the art, combined them, it is true, as they had been combined before; but with his combination he secured a new and unique application of the power in a way not theretofore done or suggested. He made it possible to use an X-ray system under circumstances and in places the system existing had been excluded from. This, we think, narrow and limited as it is, was invention. It was not the invention of a transformer; it was the original idea of taking what was in the art and adapting it to a new purpose in a novel way.

Opinion of the Court

We need not dwell upon the beneficial results which followed the use of plaintiff's device in connection with the X-ray system. It was used in the war most beneficially, and it is being used by the Army to-day. We have no doubt upon the subject of user. The defendant's alleged modification is not sufficiently distinct to differentiate the two transformers. The plaintiff's patent was sufficiently broad to cover all structures coming within his claim. The findings show that the defendant used the patent in suit and used it to very great advantage. The two separate transformers were discarded and the defendant has found the new Coolidge X-ray system with the plaintiff's transformer to be one adaptable to its needs and occupying a place the old system did not meet.

We do not go at length into the prior art. The findings afford an opportunity for its review. The single claim of the patentee and the acknowledged limitations of his patent circumscribe the inquiry. The exhibits filed and considered unmistakably disclose that prior to the plaintiff's patent the Coolidge X-ray system functioned by the use of and depended upon a single step-up transformer for supplying current to the anode and another step-down transformer for voltage to the cathode. And no exhibit appears in the record of a combined transformer suitable to or adaptable to use with a Coolidge tube X-ray system, except the patent in suit. So far as the prior art is involved, we feel confident in the assertion that no single transformer appears of record to have the windings necessary to use in a Coolidge X-ray system.

A doubt existed as to compliance by the patentee with R. S. section 4900, as amended by the act of February 7, 1927, requiring the marking and giving notice of patents. The parties were required to furnish additional briefs upon this point. We now believe that even in the absence of markings that the United States was fully advised and possessed knowledge of plaintiff's patent. Doctor Shearer knew of plaintiff's patent at the time he exhibited the patent to prospective bidders, and in addition to this he assembled the parts of the patent and was fully cognizant of

Syllabus

the existence of plaintiff's rights. The testimony does disclose that the plaintiff gave instructions to mark the patent, but it was not done. On the other hand, the representative of the successful bidder to manufacture for the Government the patent in suit does not expressly disclaim knowledge of the existence of the patent. It is impossible to conclude that any injury was done because of the absence of the markings. This is a suit against the Government, and notice to the Government of plaintiff's patent rights is clearly established.

Two other minor patents are declared upon. Plaintiff does not insist upon them if sustained as to patent 1343599. If patents No. 1371011 and No. 1420395 are relied upon as augmenting damages as for infringement, we think both have been anticipated by the prior art, and that as to No. 1371011 the defendant did not use it.

The case will be remanded to the general docket in accord with the agreement of the parties, with leave granted to take such proof as the agreement provides for respecting damages. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

EDWARD T. ESTY, AS EXECUTOR OF THE WILL OF GEORGE I. ALDEN, DECEASED, v. THE UNITED STATES

[No. E-258. Decided May 2, 1927]

On the Proofs

Income tax; trust fund; income subject to disposition by beneficiary.—Where the creator of a trust fund grants to himself as beneficiary the right to the net income therefrom as often as he may request it of the trustees, the income tax imposed by section 219(d) of the revenue act of 1918 upon the beneficiary applies to the entire net income subject to the trust and is not limited to the part thereof paid to the beneficiary.

Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. L. Russell Alden for the plaintiff. *Messrs. Frederick L. Fishback* and *Harry A. Fellows* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff's decedent, George I. Alden, hereinafter referred to as the decedent, in whose name this suit was originally brought, was at all of the times mentioned herein and until his death a citizen of the United States and a resident of Worcester in the State of Massachusetts. He died on September 13, 1926, while this suit was pending, and on October 5, 1926, Edward T. Esty, who is the duly appointed, qualified, and acting executor of the will of the decedent, was by order of court herein admitted as such executor to prosecute this suit.

II. On August 24, 1912, the decedent executed and delivered to himself, George I. Alden, Albert H. Stone, and Edward T. Esty, all of Worcester, Mass., a certain instrument or deed in trust whereby he conveyed to the said George I. Alden, Albert H. Stone, and Edward T. Esty as trustees thereunder certain property upon certain trusts and subject to certain reservations therein set forth, to be known as the "George I. Alden Trust," a copy of which instrument or deed in trust, together with all amendments thereto, is attached to the petition in this case, marked "Exhibit A," and is by reference made a part of this finding.

III. Clause 2 of said instrument or deed in trust of August 24, 1912, provides as follows:

"2. The trustees shall pay, as often as requested, to me during my life the net cash income from said trust fund; and they may further pay to me from time to time as much of the principal as they may in their judgment deem advisable."

IV. On November 24, 1917, the decedent acting under and in conformity with the power of amendment reserved to himself in clause 27 of the said instrument or deed in trust of August 24, 1912, amended the same in certain respects and in particular by substituting for said clause 2 thereof the following:

"2. The trustees shall pay, as often as requested, to me during my life the net cash income from said trust fund, and they may further pay to me from time to time as much of the principal as they may in their judgment deem advisable.

"Upon my death any income then in the hands of the trustees shall be disposed of by the trustees as income accruing subsequent to my death, except as hereinafter provided in clause 10."

V. On July 5, 1918, the decedent acting under and in conformity with the power of amendment reserved to himself in clause 26 of the said instrument or deed in trust of August 24, 1912, as amended by the third amendment thereof, dated November 24, 1917 (being the same in wording as clause 27 of the original instrument or deed in trust of August 24, 1912), further amended the same in certain respects and in particular by substituting for clause 2 as previously amended the following:

"2. The trustees shall pay to my daughter, Clara L. Alden, during my lifetime, at such times during each year as may be convenient to the trustees, twenty-seven per cent (27%) of the net cash income from said trust fund, shall pay, as often as requested, to me during my lifetime the balance of said net cash income, and they may further pay to me from time to time as much of the principal as they may in their judgment deem advisable.

"Upon my death any income then in the hands of the trustees shall be disposed of by the trustees as income accruing subsequent to my death, except as hereinafter provided in clause 10."

VI. On March 10, 1920, the decedent, acting under and in conformity with the power of amendment, reserved to himself in clause 26 of the said instrument or deed in trust of August 24, 1912, as amended by the third amendment thereof dated November 24, 1917 (being the same in wording as clause 27 of the original instrument or deed in trust of August 24, 1912), further amended the same in certain respects and in particular by substituting for clause 2 as previously amended the following:

"2. The trustees shall pay to my daughter, Clara L. Alden, during my lifetime, at such times during each year as may be convenient to the trustees, twenty-seven per cent (27%) of the income from the Norton Company stock, without

deductions on account of charges, contributions, or expenses, but not including interest on accrued interest from the trust fund or from any securities in which accrued interest may have been invested, shall pay, as often as requested, to me during my lifetime the balance of the net cash income, including said interest, and they may further pay to me from time to time as much of the principal as they may in their judgment deem advisable. Upon my death any income then in the hands of the trustees shall be disposed of by the trustees as income accruing subsequent to my death, except as provided in clause 10 of the alteration of the trust instrument dated November 24, 1917."

VII. On July 16, 1920, decedent acting under and in conformity with the power of amendment reserved to himself in clause 26 of the said instrument or deed in trust of August 24, 1912, as amended by the third amendment thereof dated November 24, 1917 (being the same in wording as clause 27 of the original instrument or deed in trust of August 24, 1912), further amended the same in certain respects and in particular by adding to clause 2 as previously amended the following:

"In explanation of the twenty-seven per cent (27%) above stated, twenty-seven per cent of the shares of stock originally forming the trust was the property of my said daughter; said shares were given by her to me for the purpose of creating the trust in connection with the shares of stock owned by me."

VIII. For the year 1918, 73 per cent of the entire net income of the trust fund amounted to $90,196.06, of which decedent asked for and was paid by the said trustees $60,-752.90; for the year 1919, 73 per cent of the entire net income of the trust fund amounted to $95,114.42, of which decedent asked for and was paid by said trustees $54,831.53; for the year 1920, 73 per cent of the entire net income of the trust fund amounted to $201,242.34, of which decedent asked for and was paid by the said trustees $95,286.61.

IX. On or before March 15, 1919, the decedent made and filed with the United States collector of internal revenue for the district of Massachusetts his Federal income-tax return for the year 1918 and included therein, along with his other income, the whole sum of $90,196.06; the total tax shown

to be due on the said return amounted to $21,890.86, which was paid by decedent in quarterly installments as follows:

Mar. 22, 1919	$5,472.71
June 14, 1919	5,472.71
Sept. 15, 1919	5,472.71
Dec. 16, 1919	5,472.73
Total	21,890.86

The decedent, upon request of the Commissioner of Internal Revenue, paid on September 6, 1921, further taxes amounting to $25.71.

On February 17, 1923, as a result of a reaudit of the return in question, decedent received a refund of $302.47, leaving a total payment by him for the year 1918 of $21,614.10.

On March 21, 1923, the decedent prepared and filed an amended income-tax return for the year 1918, including along with his other income the item of $60,752.90, which he had asked for and actually received from the trust fund, and omitting therefrom the item of $90,196.06 (being the amount reported in the original return as having been received from the trust fund); the tax shown to be due on the amended return was $11,901.47, being $9,712.63 less than the total payment made by him on the original return as adjusted by the commissioner's audit; and on or about March 21, 1923, decedent filed a claim for refund of $9,712.63, which claim was rejected by the Commissioner of Internal Revenue on August 19, 1924.

X. On or before March 15, 1920, decedent made and filed with the United States collector of internal revenue for the district of Massachusetts his Federal income-tax return for the year 1919 and included therein along with his other income the whole sum of $95,114.42; the total tax shown to be due on the said return amounted to $20,968.76, which was paid by the decedent in quarterly installments as follows:

Mar. 12, 1920	$5,242.19
June 14, 1920	5,242.19
Sept. 16, 1920	5,242.19
Dec. 16, 1920	5,242.19
Total	20,968.76

Reporter's Statement of the Case

On February 17, 1923, as a result of the audit of the return in question, decedent received a refund of $125.58, leaving a total payment by him for the year 1919 of $20,843.18.

On March 21, 1923, decedent prepared and filed an amended income-tax return for the year 1919, including along with his other income the item of $54,831.53, which he had asked for and actually received from the trust fund, and omitting therefrom the item of $95,114.42 (being the amount reported in the original return as having been received from the trust fund); the tax shown to be due on the amended return was $8,213.93, being $12,629.25 less than the total payment made by him on the original return as adjusted by the commissioner's audit; and on or about March 21, 1923, decedent filed a claim for refund of $12,629.25, which claim was rejected by the Commissioner of Internal Revenue on August 19, 1924.

XI. On or about March 12, 1921, decedent made and filed with the United States collector of internal revenue for the district of Massachusetts his Federal income-tax return for the year 1920 and included therein, along with his other income, the whole sum of $201,242.34; the total tax shown to be due on the said return amounted to $70,651.32, which was paid by decedent in quarterly installments as follows:

Mar. 16, 1921	$17,662.83
June 17, 1921	17,662.83
Sept. 22, 1921	17,662.83
Dec. 15, 1921	17,662.83
Total	70,651.32

On March 21, 1923, decedent prepared and filed an amended income-tax return for the year 1920, including along with his other income the item of $95,286.61, which he had asked for and actually received from the trust fund, and omitting therefrom the item of $201,242.34 (being the amount reported in the original return as having been received from the trust fund); the tax shown to be due on the return was $22,098.81, being $48,552.51 less than the total payment made by him on the original return; and on or about March 21, 1923, decedent filed a claim for refund of

$48,552.51, which claim was rejected by the Commissioner of Internal Revenue on August 19, 1924.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

On August 24, 1912, plaintiff's decedent, George I. Alden, executed and delivered to Albert H. Stone, Edward T. Esty, and to himself, a certain trust instrument by the terms of which he conveyed certain properties to said trustees, with direction and authority to collect the income and make disposition thereof during the lifetime of plaintiff's decedent. After the death of the beneficiaries under the trust the entire income was to be used for certain charitable and educational purposes. The instrument was several times modified, but the particular provision involved in this controversy was never altered. It is contained in clause 2 of the original conveyance, and is as follows: "The trustees shall pay, as often as requested, to me during my lifetime the net cash income of the said trust fund; and they may further pay to me from time to time, as much of the principal as they may in their judgment deem advisable."

During the years 1918, 1919, and 1920 plaintiff's decedent requested the payment of only a part of the net income, and the trustees paid to him only the amount so requested. However, he included in his tax return for each of said years the entire net income as if the whole amount had been actually received, and paid the tax for each year computed on the income shown by his returns. Later, plaintiff's decedent filed a claim for refund based on the contention that he should have included in his tax returns only that amount of the income which had actually been received by him. This claim was rejected by the Commissioner of Internal Revenue and this action is for the recovery of same. The amount involved is $70,894.39.

The tax in this case was collected under the revenue act of 1918, 40 Stat. 1057, the applicable provisions of which are as follows:

"SEC. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the revenue act of 1916 and by

Opinion of the Court

section 1 of the revenue act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates: * * *."

(Here follow the rates.)

"SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

* * * * * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * *

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate, or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust."

It is the contention of plaintiff that the provision of the trust deed that "The trustees shall pay as often as requested to me during my lifetime the net cash income from said trust fund * * *," created and vested in plaintiff's decedent a general power of appointment and that he acquired no property in said income, and did not under the language of the act of 1918 above set forth become a beneficiary of the net cash income of the trust fund, until he had exercised his power of appointment by requesting its payment and collecting same. The court is unable to agree with this theory.

Syllabus

Under the terms of the trust instrument the trustees were required to pay to plaintiff's decedent not merely such part of the net income as he might request but to pay the entire amount *at such times* as he might request. No right whatever was reserved to the trustees as to any part of the net income which he might not request. Plaintiff's decedent was the unqualified owner of the net income. It was held by the trustees subject to payment to the founder of the trust "as often as requested." The trustees were not authorized to invest any uncollected portion, nor to add same to the principal, nor to make any other disposition of it. They did have authority under clause 10 of the trust instrument "to use as much of the income during my lifetime as I may request in writing * * * for the promotion of the objections set forth in Clause XI, and may add to the principal so much of the income, from time to time, as I may request in writing." It does not appear that this authority was ever exercised. Plaintiff's decedent alone had the disposition of the net income, and it is taxable under section 219 (d) which provides that "there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the trust."

It is the judgment of the court that plaintiff's petition be, and the same is hereby, dismissed.

GRAHAM, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

WILLIAMSPORT WIRE ROPE CO. v. THE UNITED STATES [1]

[No. D-1050. Decided May 2, 1927]

On Demurrer to Petition

Income tax; jurisdiction; discretion of Commissioner of Internal Revenue in applying internal-revenue laws.—There can be no recovery in the Court of Claims for a tax exaction resulting from the failure of the Commissioner of Internal Revenue to apply to plaintiff's tax return sections of the revenue law which it is alleged are applicable but which are within the discretionary power of the commissioner to apply.

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[1] Writ of certiorari granted.

Opinion of the Court

The Reporter's statement of the case:

Mr. Thaddeus G. Benton, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. Clarence A. Miller, opposed. *Messrs. James Walton* and *Moultrie Hitt* were on the briefs.

Mr. Donald Horne filed a brief as *amicus curiæ*.

The material allegations of the petition are stated in the opinion.

BOOTH, *Judge*, delivered the opinion of the court:

This is a tax case. The petition alleges a right of recovery upon two items. To the first item the defendant demurs. The facts alleged to sustain the cause of action are as follows: The plaintiff, a Pennsylvania corporation engaged in the manufacture of wire rope, on June 15, 1919, filed with the collector of internal revenue for the proper district its income-tax return for the year 1918. Plaintiff then conceded an income, excess, and war-tax liability upon the return so filed of $306,381.77, and the same was duly paid in four installments without protest. Subsequently the Commissioner of Internal Revenue, through revenue agents, made an examination of plaintiff's books of account, and on April 14, 1920, advised the plaintiff that a revised computation of its income-tax return had increased its tax liability for the year 1918 to the extent of $89,094.85. Plaintiff protested this action of the commissioner, but the commissioner made the additional assessment, and it was finally paid by the plaintiff under protest. Thereafter the commissioner discovered an error in his computation resulting in an overpayment of $12,393.09, which amount was on June 10, 1924, refunded to the plaintiff, leaving an aggregate tax assessed, levied, and paid by the plaintiff upon its return, of $383,083.53.

On June 14, 1924, the plaintiff filed with the commissioner a claim for a refund of $100,000, stating therein that the amount so claimed represented the amount by which its tax computed under section 301 of the revenue act of 1918 exceeded its tax computed under sections 327 and 328 of the

Opinion of the Court

revenue act of 1918, insisting upon a right to have its tax liability computed in accordance with sections 327 and 328 *supra*. The commissioner declined to refund. The petition further alleges that as a matter of fact as well as law plaintiff is entitled to have its excess-profits tax and war-profits tax computed in accordance with sections 327 and 328 of the revenue act and not under the provisions of section 301 of the same law. To this end the allegation is made that it is impossible for the commissioner or anyone else to determine the correct amount of plaintiff's invested capital as defined in section 326 of the revenue act of 1918; that abnormal conditions exist affecting the capital and income of the plaintiff which work upon it an exceptional hardship, evidenced by gross disproportion between the tax paid by it and its tax computed by reference to representative corporations engaged in the same trade or business. To sustain this allegation particular instances are cited. First, it is alleged that plaintiff pursued a policy of charging large sums expended for plant additions and improvements to an expense account and not to capital; second, that prior to the year 1918 plaintiff developed valuable secret processes essential to the profitable operation of its business, and no part of the cost thereof has ever been capitalized, and the commissioner ignored this fact in making up his adjustment of plaintiff's invested capital; third, that plaintiff, since its organization, has never undergone a reorganization or merger, but has since its organization in May, 1887, conducted an increasing and important business and thereby acquired a good will which asset is not recorded on its books and the value thereof was ignored by the commissioner in ascertaining plaintiff's invested capital; that under regulations of the commissioner, its good will is an asset of the value of $1,037,713; fourth, that plaintiff, during the year 1918, borrowed money to use in its business; that on January 1, 1918, plaintiff was using in its business $114,834.91, borrowed funds, and on December 31, 1918, for a like purpose was using $122,353.82; that its capital stock was $100,000; that at the beginning of the year its percentage of borrowed money to capital stock was 114.8 per cent, and at the end of the year 122.3 per cent; fifth,

it is alleged that the salaries of its officers were abnormally low, averaging but 3.76 per cent of its taxable income for the year, and finally concluding with the allegation that a comparison of the rate of tax imposed upon the plaintiff with the rate imposed upon representative corporations engaged in a like trade or business would disclose the fact that as to the plaintiff the rate exacted is 63.87 per cent of its taxable income, whereas as to representative corporations the rate is not in excess of 55 per cent of their taxable income. The prayer for judgment is somewhat obscure. If we correctly apprehend it, suit is for the recovery of $100,000 on this item with interest thereon from date of the payment of the final installment, viz: December 31, 1919.

Sections 327 and 328 of the revenue act of 1918 (ch. 18, 40 Stat. 1093), provide in terms as follows:

" SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

"(a) Where the commissioner is unable to determine the invested capital as provided in section 326;

"(b) In the case of a foreign corporation;

"(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

"(d) Where, upon application by the corporation, the commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income derived on a cost-plus

basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

"SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

"In computing the tax under this section the commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

"(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

"In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid, together with interest at the rate of one-half of 1 per centum per month, on such excess from the time the installment was due.

"(c) The commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of

Opinion of the Court

invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257."

Section 326 of the revenue act of 1918 (40 Stat. 1092) defines invested capital and is in terms as follows:

"(a) That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section);

"(1) Actual cash bona fide paid in for stock or shares;

"(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided*, That the commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

"(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

"(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

"(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding

Opinion of the Court

(a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided*, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

"(b) As used in this title the term 'invested capital' does not include borrowed capital.

"(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

"(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

"The average invested capital for the pre-war period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years."

A tax case in this court is a suit against the United States founded under our jurisdictional act (section 145, Judicial Code) upon a law of Congress. The right to sue for internal revenue tax is conditioned upon its payment, application for a refund and denial of the same. *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States*, 254 U. S. 141. Under the allegations of the petition, heretofore recited, it is obvious that the present suit is for a recovery of an alleged illegal tax exaction resulting from the alleged failure of the commissioner to apply to plaintiff's tax return the applicable sections of the revenue law—i. e., sections 327 and 328, *supra*. Plaintiff does not allege that if section 301 of the revenue act of 1918 has been legally applied in the assessment and levy of the taxes involved, an over or illegal assessment follows, and judgment for the amount paid thereunder is recoverable. On the contrary,

Opinion of the Court

the gravamen of the complaint is that sections 327 and 328 of the statute are the applicable sections of the law under which the assessment and levy should have been made, and if so made, would result in a difference of $100,000 in the amount paid and what should have been paid. The court is manifestly without authority to *compute* a tax under sections 327 and 328 of the revenue law. The commissioner has refused to apply the sections as requested, and we have no means to compel him to do so. Sections 327 and 328 of the statute point out the method to be pursued by the commissioner in applying special assessment. In his office, and available to him, are the facts, the records, voluminous and important, upon which the commissioner relies in making comparisons with representative corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

Plaintiff admits that internal-revenue taxes are justly due from it to the United States. The issue presented by the petition goes only to the amount. We are not asked to set aside the assessment and levy made under section 301 and award judgment for all the taxes paid thereunder. The relief sought by the plaintiff is a judgment founded upon a law of Congress under which the plaintiff has not incurred a tax liability, under which it has been assessed no taxes, and under which it has paid no taxes. The plaintiff's taxes were assessed under section 301. They were levied and collected under that section, and no complaint is made that if the section is applicable the amount assessed and paid is illegal. The plaintiff, in our view of the case, has mistaken the remedy. As said by the Supreme Court in the *Rock Island case*, *supra*, "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions

must be complied with." Clearly the plaintiff has paid no taxes under sections 327 and 328 of the statute. The commissioner has not levied or assessed any under the sections, and no claim for refund has been made or refused for any sum or sums exacted of the plaintiff under the above sections. What sum the commissioner might exact or might have exacted under the special assessment provisions relied upon is a problem with which under the petition we are not concerned, and until he does apply the provisions the court is powerless to proceed.

In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special assessment sections. Plaintiff did not in the beginning question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under section 326. The presumption is that the commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the commissioner found the statutory difficulties which precluded an assessment under section 301. On the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the commissioner's until he exacts taxes under sections 327 and 328 and the same are paid thereunder,

Reporter's Statement of the Case

and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. *Louisiana* v. *McAdoo*, 234 U. S. 627; *United States* v. *Babcock*, 250 U. S. 328; *Ray Consolidated Copper Co.* v. *United States*, 268 U. S. 373.

The demurrer to the first item of the petition will be sustained, and as to that item the petition is dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

On October 17, 1927, on motion of plaintiff, defendant consenting, the petition was dismissed.

DANIEL McKENZIE v. THE UNITED STATES

[No. D–979. Decided May 2, 1927]

On the Proofs

Army pay; retired enlisted man receiving pay of warrant officer.— Enlisted men of the Army, retired as such and thereafter serving under temporary commissions during the World War, receive the retired pay of warrant officers under the act of June 4, 1920, upon discharge from such commissions, and are not entitled to the retired pay of warrant officers provided for by the subsequent act of June 10, 1922, 42 Stat. 629.

The Reporter's statement of the case:

Mr. S. T. Ansell for the plaintiff.

Mr. John G. Ewing, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, Daniel McKenzie, served as an enlisted man in the United States Army from December 15, 1881, until December 10, 1911, when he was retired after 30 years' service while serving as a first sergeant.

Opinion of the Court

II. Plaintiff accepted October 23, 1917, an appointment as captain, Quartermaster Corps, National Army. February 27, 1919, he accepted an appointment as major, and was honorably discharged the service August 25, 1919, as a major, Quartermaster Corps. He served with the American Expeditionary Forces from April 7, 1918, to July 30, 1919, accepted a commission as major, Quartermaster Section, Officers' Reserve Corps, March 15, 1920, and was reappointed as of that grade March 26, 1925. It does not appear from the records of the Adjutant General's Office, War Department, that he has rendered any active service under his commission in the Officers' Reserve Corps.

III. As a retired enlisted man of the Army plaintiff was paid from July 1, 1922, to June 6, 1924, at the rate of $115.50 per month, or a total amount between said dates of $2,679.60.

IV. Had plaintiff's pay been computed on the basis of pay authorized for warrant officers of the Army by section 9 of the act of June 10, 1922, 42 Stat. 629, he would have received retired pay at the rate of $138.75 per month for the period from July 1, 1922, to June 6, 1924, a total of $3,219, or $539.40 more than was actually received by him during that period.

The court decided that plaintiff was not entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

The plaintiff, after serving for thirty years in the Army as an enlisted man, was, on December 10, 1911, retired while serving as a first sergeant. On October 23, 1917, he accepted an appointment as captain, Quartermaster Corps, National Army, and on February 27, 1919, he accepted an appointment as major, and was honorably discharged from the service on August 25, 1919, as a major, Quartermaster Corps. He served with the American Expeditionary Forces from April 7, 1918, to July 30, 1919. He then reverted to the retired list as an enlisted man. After June 4, 1920, he received the retired pay of a warrant officer of the Army as provided in the act of June 4, 1920, 41 Stat. 761, 786, which act provides as follows:

"* * * Retired enlisted men who have served honorably as commissioned officers of the United States Army at

some time between April 6, 1917, and November 11, 1918, including those who have been placed on the retired list during the World War, and who have been or may hereafter be discharged from their temporary commissions, shall receive the retired pay and allowances of warrant officers on the retired list, as provided in this act, * * *

"* * * Warrant officers, other than those of the Army Mine Planter Service, shall receive base pay of $1,320 a year and the allowances of a second lieutenant, shall be entitled to longevity pay and to retirement under the same conditions as commissioned officers, * * *."

The plaintiff claims in this suit that he is entitled to be paid the retired pay of a warrant officer under the provisions of the act of June 10, 1922, 42 Stat. 629. The amount he claims is the sum of $539.40 more than was actually received by him for the period from July 1, 1922, to June 6, 1924. See the act of June 6, 1924, 43 Stat. 472.

The plaintiff claims that for the period mentioned he was in effect a retired warrant officer, and that as such he is entitled to the retired pay of a warrant officer provided for in the act of June 10, 1922.

The act of June 4, 1920, gave to enlisted men who had served honorably as commissioned officers of the United States Army at some time between April 6, 1917, and November 11, 1918, the retired pay and allowance of warrant officers on the retired list, as provided in that act. By virtue of this act certain retired enlisted men were, as to pay, put in a class of their own. There is nothing in the act which can be said to change their status from enlisted men to warrant officers; they still continued to be enlisted men, but were to receive the pay and allowances of warrant officers if they had served as commissioned officers of the United States Army in accordance with the provisions of the act. The act did not make them warrant officers on the retired list, and no subsequent legislation dealing with the pay of warrant officers on the retired list could have any effect upon the pay of this class of retired enlisted men, for their status as to pay was fixed by the act of June 4, 1920; that pay was the retired pay and allowances of warrant officers on the retired list as provided in that act. The

Syllabus

plaintiff was never a warrant officer, and unless some subsequent legislation gave him that status he must be paid under the provisions of the act of June 4, 1920. If, indeed, the act of June 10, 1922, can be construed to mean that enlisted men of the Army on the retired list are to be paid as warrant officers on the retired list, then the plaintiff is entitled to recover. But we can not so construe the act of June 10, 1922. The plaintiff cites the provision of the act of June 10, 1922, which provides that "on and after July 1, 1922, retired enlisted men of the Army and Marine Corps shall have their retired pay computed as now authorized by law on the basis of pay provided in this act," which must mean that the pay of retired enlisted men must be computed on the basis of active pay provided for enlisted men by that act, and so if it is to be so computed the plaintiff would get less retired pay than he is now receiving; but the provisions of the act of June 4, 1920, saved the plaintiff, who is in a special class of retired enlisted men, from receiving less pay than is provided for in the act of June 4, 1920. See 2 Comp. Gen. 96.

The petition of the plaintiff must be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

PITTSBURGH HOTELS CO. v. THE UNITED STATES [1]

[No. E-397. Decided May 2, 1927]

On the Proofs

Income tax; return on accrual basis; deductions; increase in public utilities rates thereafter sustained by the courts.—In making its income-tax return for the year 1919, plaintiff, which kept its books on an accrual basis, was entitled to include therein as a deduction the difference between contract rates to supply

[1] Writ of certiorari denied.

it with heat and light, and increased rates filed prior to the return with a public service commission and sustained thereafter by an appellate court, although the increase was not paid by the plaintiff until after the decision of the court.

The Reporter's statement of the case:

Mr. S. Leo Ruslander for the plaintiff. *Mr. George R. Beneman* was on the brief.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is and was at all times mentioned in the petition a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at Pittsburgh, Pennsylvania.

II. Plaintiff's petition is filed to recover from the United States of America the sum of $20,253.31, with such an amount of interest as may be allowed by law. This is the amount paid by plaintiff under duress and with written protest to the collectors of internal revenue for the twenty-third district of the United States in the Commonwealth of Pennsylvania as additional income and excess-profits taxes assessed for the year 1919 by the Commissioner of Internal Revenue. Of said sum, $5,191.96 thereof was paid by plaintiff on June 14, 1920, to C. G. Llewellyn, the then collector of said twenty-third district, and $15,061.35 thereof was paid by plaintiff to D. B. Heiner, the then collector of said twenty-third district, on March 20, 1924.

III. Plaintiff was, during all of the year 1919 and within the provisions of section 240(b) of the revenue act of 1918, the parent company controlling by direct ownership and otherwise all of the stock of and thus affiliated with the William Penn Hotel Company, the Fort Pitt Hotel Company, and the Hotel Service Company, all Pennsylvania corporations. The William Penn Hotel Company owned, operated, and conducted the William Penn Hotel, located

in Pittsburgh; the Fort Pitt Hotel Company leased, operated, and conducted the Fort Pitt Hotel, located in Pittsburgh; and the Hotel Service Company was engaged in certain service activities connected with both of said hotels.

IV. Plaintiff in due course and within the provisions of section 240 (a) of said revenue act of 1918 and Internal Revenue Regulations No. 45, filed with the internal revenue collector at Pittsburgh, Pennsylvania, a consolidated income and excess-profits tax return for the year 1919 for itself and the said affiliated corporations, which said return showed income and excess-profits tax liability of plaintiff aggregating $37,037.00, of which said tax $16,000.00 thereof was paid under date of March 13, 1920, and $21,037.00 thereof was paid under date of June 10, 1920, both payments being made by plaintiff to C. G. Llewellyn, the then collector of internal revenue for the aforesaid district. The total paid was the tax due as shown on the return filed.

V. The basis of this suit is the addition by the Commissioner of Internal Revenue to income for the year 1919 as reported by plaintiff of the sum of $28,924.47, representing a liability due the Allegheny County Steam Heating Company, the sum of $7,716.45 representing a liability due the Duquesne Light Company, and the sum of $35,682.23 disallowed depreciation on the William Penn Hotel Building and the resulting additional taxes based thereon.

VI. Plaintiff proceeded duly and legally, as required by the revenue act of 1918, to protest a proposed additional assessment of income and profits taxes for the years 1917, 1918, and 1919, and followed said protest through the committee on appeals and review and the office of the solicitor to the Commissioner of Internal Revenue, which appeal was, on June 29, 1923, in part allowed, but for the year 1919 denied as to the matters and in the amounts in this case complained of. Payment of said additional amounts was made under protest on or about June 14, 1924, and a claim for refund in the sum of $21,000.00, covering the items complained of in the petition in this case, was duly filed on September 13, 1924. Said claim for refund was rejected by the Commissioner of Internal Revenue on December 15, 1924, and as a

result the $20,253.31 sought to be recovered in this action is now retained and held by the United States.

VII. The William Penn Hotel Company on December 31, 1919, had set up on its books for the year 1918 a liability of $6,476.47 and for the year 1919 a liability of $22,458.00, or a total of $28,934.47 due the Allegheny County Steam Heating Company, and a liability of $2,624.46 for the year 1918 and $5,091.99 for the year 1919, or a total of $7,716.45 due the Duquesne Light Company. The total of said liabilities, to-wit, $36,650.92, was entirely disallowed by the Commissioner of Internal Revenue as an expense, and said amount was added by the Commissioner of Internal Revenue to income of plaintiff for the year 1919. The said liabilities represented increased charges for steam and electrical energy billed by said respective companies to the William Penn Hotel Company from October, 1918, to December 31, 1919, but not paid by plaintiff during said years because of proceedings, first before the public service commission and then in the courts of the State of Pennsylvania, brought to test the right of said public service corporations to raise rates over an unexpired contract rate.

VIII. The charges for steam and electrical energy involved in this case were incurred under contracts between the William Penn Hotel Company and the Allegheny County Steam Heating Company as to steam and the Duquesne Light Company as to electric energy, both contracts being dated June 15, 1914, true and correct copies thereof being attached to the petition in this case and marked Exhibits "A" and "B."

IX. On or about September 8, 1917, the said Allegheny County Steam Heating Company filed with the Public Service Commission of the State of Pennsylvania a new tariff, effective October 8, 1917, and on May 1, 1918, the Duquesne Light Company also filed with said commission a new tariff, effective May 31, 1918. The said two new tariffs increased the rates to be charged the William Penn Hotel Company over the said unexpired contract rates. The said heating and lighting companies, starting in October, 1918, billed the William Penn Hotel Company monthly at the new tariff

rates, claiming that they superseded the contract rates. The William Penn Hotel Company paid the contract rates and did on December 31, 1919, set up the difference between the contract rates and the new tariff rates billed as a liability and charged the full new tariff rates to expense. The said difference between the contract rates and the rates as billed totals $36,650.92 for the years 1918 and 1919.

X. One H. C. Frick, prior to and during 1919, had contracts with the said heating and lighting companies for steam heat and electric energy, which were similar in nature to those entered into with the William Penn Hotel Company, and which said contracts likewise provided for a specified rate or charge.

In August, 1919, said H. C. Frick filed a complaint with the Public Service Commission of the State of Pennsylvania to test the right of said companies to charge a rate in excess of his contract rate. The public service commission sustained the complaint, but upon appeal the Superior Court of Pennsylvania reversed the decision of said commission. Subsequently, upon appeal from the Superior Court to the Supreme Court of Pennsylvania, the Supreme Court affirmed the decision of the Superior Court, said decision being reported as *Duquesne Light Company et al.* v. *Public Service Commission et al., appellants*, 273 Pa. 287. Plaintiff was not directly or indirectly a party to said proceedings or suits.

XI. Plaintiff, on February 11, 1925, which was subsequent to the decision reported in 273 Pa. 287, paid to the Allegheny County Steam Heating Company the said sum of $28,934.47, and to the Duquesne Light Company the sum of $7,716.45.

Said liabilities accrued by plaintiff as aforesaid were accrued by said Allegheny County Steam Heating Company and Duquesne Light Company as billed and included in and reported as income for said years 1918 and 1919 by the said Allegheny County Steam Heating Company and Duquesne Light Company, and income and excess-profits tax at 1918 and 1919 rates paid thereon.

XII. Since the filing of the petition in this case the Commissioner of Internal Revenue in his audit of plaintiff's

returns for the period subsequent to 1919 has allowed said accrued charges for steam and electric energy as proper charges to expense in the years accrued on plaintiff's books and has thereby reversed his action for periods subsequent to 1919.

XIII. Part of the additional tax collected from plaintiff for 1919 arises by reason of the disallowance by the Commissioner of Internal Revenue of part of the depreciation claimed and taken by plaintiff in its consolidated income and excess-profits tax return for 1919 upon the hotel building of the William Penn Hotel Company, known as the William Penn Hotel. The amount of depreciation taken by plaintiff was $83,258.77 or 3½ per cent per annum, of which amount the Commissioner of Internal Revenue allowed $47,576.44 and disallowed $35,682.33. The said allowance was based upon a depreciation rate of 2 per cent, thus ascribing to the building a probable useful life of fifty years.

XIV. The William Penn Hotel is what is known as a steel-frame building, covered with brick, stone, and concrete, and qualifies as fireproof construction. It is located in Pittsburgh, Allegheny County, Pennsylvania, fronting 216 feet on William Penn Way and running 130 feet along Oliver Avenue and a corresponding length on Sixth Avenue. It is 19 stories above ground and 3 stories underground. It is 265 feet high, contains six passenger elevators and four freight elevators, which run from the basement to the seventeenth floor. The average height of the guest rooms is nine feet. The lobby, which occupies approximately 8,000 square feet, is 25 feet in height; the largest main dining room, which occupies 4,000 square feet, is 23½ feet high; the second main dining room, which occupies 2,080 square feet, is 13½ feet high; the main ballroom, which occupies approximately 5,750 square feet, is 30½ feet high. The total ground space of the hotel is approximately 27,300 square feet. The building is not constructed for the use of the ground floor by stores. The whole building in 1919 was used for hotel purposes.

The William Penn Hotel was completed and thrown open to the public on March 15, 1916, and in 1919 had an average

of 731 persons per day occupying its guest rooms and an average of 1,757 persons per day using its restaurants.

The part of the building on which the 3½ per cent rate of depreciation is claimed consists of the foundations, framework, walls, roof, floors, trimming, inside stairways of steel and reinforced concrete, and other fixtures, exclusive of plumbing fixtures, heating and ventilating systems, electric wiring, elevators, lighting fixtures, tile floors, and elevator machinery, the depreciation on which is allowed at a higher rate and so not here at issue. Plaintiff claimed and accepted a 2 per cent rate for years previous to 1919.

XV. The cost of the said William Penn Hotel building, exclusive of elevators, fixtures, and parts not in dispute, as of December 31, 1918, and upon which depreciation is claimed as aforesaid, was $2,378,822.09.

The court decided that plaintiff was entitled to recover the sum of $10,262.25, with interest thereon from June 14, 1924, to date of judgment amounting to $1,775.37, an aggregate of $12,037.62.

BOOTH, *Judge*, delivered the opinion of the court:

This is a tax case and involves a claim for two alleged overassessments upon plaintiff's income and excess-profits return for the year 1919. The additional tax exacted was paid under protest, a refund asked and refused, hence no jurisdictional question appears.

The plaintiff is a Pennsylvania corporation, engaged in the hotel business, this suit concerning alone its ownership and operation of the William Penn Hotel in Pittsburgh, Pa. The first item of the suit seeks a judgment for $10,262.25, with interest, and right of recovery is rested upon section 214 (a) (1) of the revenue act of 1918, 40 Stat. 1066, which provides in terms as follows:

"* * * That in computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *"

Opinion of the Court

The second item for the recovery of judgment for the sum of $9,991.06, with interest, is predicated upon (8) of section 214 (a) of the revenue act of 1918, 40 Stat. 1067, which provides as follows:

"SECTION 214 (a). That in computing net income there shall be allowed as deductions:

* * * * * * *

"(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

The first item is the result of a situation growing out of a difference between contract rates to supply the plaintiff with heat and light and an increase over and above the contract rates subsequently allowed the corporations furnishing plaintiff with heat and light by the Public Service Commission of Pennsylvania. Plaintiff company in 1914, by express contracts with the Allegheny County Steam Heating Company and the Duquesne Light Company, obtained from said companies a fixed price for supplying heat and light to it for a period of years. On September 8, 1917, the heating company filed with the public service commission of the State a new tariff, effective October 8, 1917. On May 1, 1918, the light company pursued the same course, its new tariff to become effective May 31, 1918. The new tariffs of both companies increased the rates to be charged the plaintiff over the contract rates stipulated in the contracts of 1914. The heating and light companies billed the plaintiff at the *new* rates, approved by the commission, and the plaintiff *paid* the *contract* rates, the difference amounting for the period involved to $36,650.92. The reason for plaintiff's withholding payment of the difference between the public-service rate and the contract rate is found in the fact that one H. C. Frick, during the year 1919, had with the same heating and light companies a contract for service similar in terms to plaintiff's contract with the same companies, and Frick, in August, 1919, lodged a complaint with the public service commission to test the right of the companies to charge and collect a rate in excess of the rates

stipulated in his contract. The controversy finally reached the courts, resulting in a decision adverse to Frick's contention, whereupon on February 11, 1925, the plaintiff paid to the heating and light companies the balance due under their bills, the record in the present case disclosing that the plaintiff did, on December 31, 1919, set up on its books of account the amounts due the heating and light companies for the year at the public-service rate. The Commissioner of Internal Revenue, in reviewing plaintiff's return for the year 1919, disallowed this item as a legal deduction from plaintiff's income, and charged back to plaintiff's total income return the full amount thereof, resulting in the assessment, levy, and collection of an additional tax thereon of $10,262.25. The commissioner justifies his ruling upon the grounds that while the plaintiff did, as of right, keep its books of account upon the accrual basis, it did not monthly, as bills for light and heat were rendered, accrue the same as a liability at the public-service rate, but only at the contract rate, waiting until the last day of the year 1919 to charge in a lump sum as a liability the full amount of the difference between what was actually paid at the contract rate and what was not paid at the public-service rate. Obviously the plaintiff did not pay the heating and light companies the public-service rate, awaiting the final determination of the legality of the rate in the Frick case. And it is correspondingly clear that the companies did not insist upon or enforce payments; but this fact is not sufficient in view of the regulations of the commissioner to warrant his refusal of a deduction carried by the plaintiff upon its books as a liability.

Article 111 of Regulation 45, among other things, provides:

"A person making returns on an accrual basis has the right to deduct all authorized allowances, whether paid in cash or set up as a liability, and it follows that if he does not within any year pay or accrue certain of his expenses, interest, taxes, or other charges, and makes no deduction therefor, he can not deduct from the income of the next or any subsequent year any amounts then paid in liquidation of the previous year's liabilities."

Opinion of the Court

The plaintiff was not a party to the Frick litigation. It was clearly susceptible to legal proceedings to collect the full amount of the bills rendered by the companies, and assuredly it is not to be denied a legal deduction when compliance with the regulations is not denied. The charge was made upon its books of account. The sum was entered, it is true, in a lump sum, but it appears as a liability. The amount is not disputed and no bad faith imputed. The commissioner allowed precisely similar items of deduction for the years 1920 and 1921, and it is difficult to perceive upon what basis an exception was made as to the year 1919. Judgment for the amount claimed will be awarded.

The second item is one of fact. The statute allows the deduction and the computation only is involved. In ascertaining a reasonable allowance for exhaustion, wear and tear of property, including obsolescence, the commissioner has promulgated a regulation to which the plaintiff takes no exception. Plaintiff insists that under the regulation it is entitled to 3½ per cent of the building's cost, and the commissioner allowed but 2 per cent. We will not discuss the facts. The plaintiff presents witnesses to establish its contention and the defendant offers contradictory testimony. Under the revenue law the commissioner's duty to first compute the allowance is manifest. Nothing in the testimony of the plaintiff, expert in character, is of such certainty as to warrant us in concluding that an injustice has been done in this particular instance. The defendant meets the issue squarely, and we are not convinced from the record that the commissioner should have allowed more than was allowed. In addition to this, the plaintiff in previous years was content with the 2 per cent deduction allowed by the commissioner, and made no protest. The same objections now interposed were available then. This item of the petition will be dismissed.

Judgment for plaintiff. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. v. THE UNITED STATES

[No. C–63. Decided May 2, 1927]

On the Proofs

Railroad transportation; accounting with United States Railroad Administration; participating carriers.—Where the plaintiff has been paid the correct rates for transportation services performed for the Government, thereafter the accounting officer makes certain deductions from bills of the United States Railroad Administration to cover alleged overpayments for the said services, the Railroad Administration charges back said deductions to other corporations who participated in said services, and plaintiff does not show an accounting on its own part, it can not recover.

Pleadings; allegations; proof.—The petition should set forth plainly the case upon which recovery is sought, and the proof must so far correspond with the allegations as not to introduce demands which the Government had no notice to meet.

The Reporter's statement of the case:

Mr. F. Carter Pope, for the plaintiff.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation organized and existing under the laws of the State of Wisconsin, and has always been loyal to the United States and has never voluntarily aided or abetted its enemies.

For many years, and at the times hereinafter stated, plaintiff has operated a system of railways in the State of Wisconsin and other States, doing business as a common carrier of passengers and freight for hire and reward under tariffs issued by itself and its connections, duly published and filed with the Interstate Commerce Commission acccording to law.

II. At various times prior to the dates of the transportation hereinafter referred to, plaintiff, in common with the other railroad carriers of the United States generally, entered into

agreement with the United States on the subject of fares and allowances for the transportation of military traffic, the said agreements being variously entitled "Interterritorial military arrangements," "Interterritorial military agreements," "Western military arrangement," etc. Said agreements were executed on behalf of carriers by the duly authorized officers of their passenger associations and on behalf of the United States by the duly authorized officers of the War and Navy Departments. One of said agreements, covering the territory through which the transportation hereinafter referred to moved, and known as "Western military arrangements," in effect at the time of said movements, is correctly set forth in Paragraph III of the petition.

III. At the instance and request of a duly authorized officer of the United States Army, plaintiff, for itself and other carriers participating in the movements, furnished transportation to the United States Army as follows:

Dates	Transportation request	Number of men
July 1, 1916	W. Q. 35026	251
July 10, 1916	35031	401
Do	35032	457
Do	35033	439
July 13, 1916	35040	69
Aug. 21, 1916	154001	124
Oct. 16, 1916	109726	31

All of said transportation was from Camp Douglas, Wis., to San Antonio and Fort Sam Houston, Tex., and under said military agreement plaintiff was entitled to be paid therefor the net cash per capita rate of $26.63.

For the transportation rendered in July plaintiff rendered its bill No. 148856; for the transportation rendered in August plaintiff rendered its bill No. 151769; and for the transportation rendered in October plaintiff rendered its bill No. 157513, all of said bills being rendered at the military agreement rate to the disbursing quartermasters of the United States Army, who paid them as rendered.

Subsequently, upon an examination of the disbursing officer's accounts, the Auditor for the War Department suspended the aforesaid payments and calculated the through

Opinion of the Court

rates by combinations of individual and party fares not authorized by said military agreements and demanded of plaintiff the refund of $386.88 alleged to have been overpaid on bill 151769, $57.66 alleged to have been overpaid on bill 157513, and $5,045.04 alleged to have been overpaid on bill 148856. Plaintiff declined to make said refunds, and thereupon the said auditor, in August, 1917, made deduction from plaintiff's bill No. 174203 for passenger service rendered by plaintiff in April, 1917, of the sum of $386.88 alleged to have been overpaid on bill No. 151769; and from Chicago, Milwaukee & St. Paul Railroad administration bills numbered 211371 and 216189 said auditor made deductions of the $5,102.70 alleged to have been overpaid on plaintiff's bills 157513 and 148856.

Plaintiff appealed from the deduction on its bill 174203 to the Comptroller of the Treasury, but the decision of the auditor was affirmed on May 10, 1918.

IV. Said deductions of $5,102.70 made from Chicago, Milwaukee & St. Paul Railroad administration bills, and said $386.88, deducted from corporate bill 174203, which had been taken up in Chicago, Milwaukee & St. Paul Federal accounts, were charged by said Chicago, Milwaukee & St. Paul Railroad administration to the railroad administrations of the respective lines participating in the movements, and with the exception of the sum of $20.77 said sum was charged back by said railroad administrations to their respective underlying corporations and by said underlying corporations credited to their respective railroad administrations and reimbursed to them in their respective final settlements.

The court decided that plaintiff was entitled to recover $386.88.

Campbell, *Chief Justice*, delivered the opinion of the court:

From the stipulation of facts upon which the case was submitted it appears that the plaintiff "for itself and other carriers participating in the movements" furnished transportation to the Army in the months of July, August, and

October, 1916. It presented its three several bills for the service upon the basis of proper fares, which the disbursing quartermasters paid as rendered without any deduction therefrom. If this suit was to recover for the service thus rendered in 1916 it would be barred by the statute of limitations of six years, because suit was not brought until March 14, 1923. But, as already said, the bills were paid in the correct amounts and any right to bring or maintain the action must therefore be predicated upon something occurring after the service was rendered and the payment therefor made. To do this it is made to appear that, in auditing the disbursing officer's accounts, the auditor made certain disallowances affecting the bills. As to one of the bills, the amount of the disallowance being $386.88, this amount was deducted in August, 1917, from another of plaintiff's bills for transportation services rendered by it in April, 1917. The right to sue on account of this deduction arose when it was made in August, 1917, and not when the services were performed and paid for in 1916. As to this item the suit was brought in time, and, the deduction being unauthorized and erroneous, plaintiff is entitled to recover the amount of it.

As to the other two items, however, a different situation is developed. The plaintiff's lines having passed under Federal control in December, 1917, the accounting officers, in order to secure reimbursement for the amounts which they claimed had been overpaid by the disbursing officers on the two bills, deducted the amount of the alleged overpayments from proper bills rendered by the Railroad Administration for services performed by it during Federal control on the plaintiff's lines. The amount so deducted from the two bills aggregates $5,102.70. Since the plaintiff was paid in full by the disbursing officer all that was claimed or was due for the services rendered, its right to sue must be predicated upon these subsequent deductions, as already stated. At this juncture it becomes important to call attention to the averments of the petition, which are as follows: "The deductions from Railroad Administration bills on account of alleged overpayment to petitioner were charged back to

petitioner and the Railroad Administration reimbursed itself out of monies otherwise due from said Railroad Administration to petitioner. Petitioner has had a final settlement with the United States Railroad Administration for its use of petitioner's property during the period of Federal control." If these averments were sustained by the facts the case would be brought clearly within the rule stated in the *Reading et al. case*, 270 U. S. 320, but the stipulated facts do not sustain these averments. On the contrary, they present a materially different case. The Railroad Administration did not charge the deductions made from its own bills against the plaintiff or "reimburse itself out of monies otherwise due" to plaintiff, as is alleged. What it did was to charge the amounts that had been deducted in varying sums "to the railroad administrations of the respective lines participating in the movements," and, continuing, the stipulation is that the "sum was charged back by said railroad administrations to their respective underlying corporations and by said underlying corporations credited to their respective railroad administrations and reimbursed to them in their respective final settlements." There is no statement here that the plaintiff has ever been required to refund or repay, or has actually accounted to either the Railroad Administration or to the other carriers for, any part of the deductions so made from the Railroad Administration bills. On the other hand the facts are not only that plaintiff's bills were paid in full by the disbursing officers, but that the Railroad Administration did not call upon plaintiff for reimbursement. It charged the deductions to "lines participating in the movements" other than the plaintiff. And the quotation above from the stipulation shows that the amounts were reimbursed to "the underlying corporations" in their respective final settlements. What the basis of these "respective final settlements" is, or the consideration to the several carriers on account of the charges made against them by the Railroad Administration and which they allowed in settlement, does not appear, nor does it appear that they were not satisfied with the settlement. This action of the Railroad Administration charging the items to them must be

treated as if it had their concurrence, since the final settlements were made and there is nothing to show that in these settlements the parties were not recompensed.

In somewhat different form the question has been before the court in several cases. See *Southern Pacific Co. case*, 62 C. Cls. 649; *Chicago, Burlington & Quincy Railroad Co. case*, No. C–28, decided February 14, 1927, and *Chicago, Milwaukee & St. Paul Railway Co. case*, No. C–910, decided February 14, 1927 (*ante*, pp. 83, 137). In the last-named case we said: "In the *Southern Pacific case* it was said: 'Without showing that it has accounted for them to the Railroad Administration the plaintiff can not recover the amount. Its bill was paid originally in full, and if the Railroad Administration has not required reimbursement on account of the deductions it is plain that plaintiff has not lost anything. To the extent it has made such reimbursement it is entitled to recover.' So in this case the plaintiff has been paid in full. It has not settled the part of the claim in question with the Railroad Administration, and the charging by the Railroad Administration of the items to other parties would not arm the plaintiff with the right to recover in the absence of proof that it has accounted to these other persons for the amount."

The case now made is not stronger than those cited. In the *Chicago, Burlington & Quincy case*, *supra*, we said: "The court can not revise the settlements between the terminal or the initial carrier on the one hand and its connecting or participating carriers on the other hand so far as their relative rights are concerned, but it can and should say to a plaintiff that it may not receive the entire amount of its bill * * * and while still holding the amount so received sue to recover a charge made by the Railroad Administration against several participating carriers." Particularly must this be true in a case where the participating carriers have themselves made "final settlements" with the Railroad Administration. We also called attention in the case just cited to the importance of setting forth in the petition the case upon which recovery is sought. The forms of pleading in the Court of Claims are not strict, but liberal.

Section 159 of the Judicial Code prescribes a petition and it has been held that "a plain statement of facts is all that is necessary." See *Atlantic Works case*, 46 C. Cls. 57, 61; *Little, administrator, case*, 19 C. Cls. 323, 330. "But the allegations and proofs must so far correspond as that the latter shall not wholly depart from the case made in the petition, and introduce demands which the Government had no notice to meet. The rule of correspondence to this extent is vital to the substance of the proceedings, and it is necessary to give to the United States the benefit of the principle of *res adjudicata* in cases where they ought to have the protection which it affords." See *Baird case*, 131 U. S. "Appendix" CVI; 8 C. Cls. 13, 16.

Our conclusion is that the plaintiff should have judgment for the item first above mentioned, and that as to the other two items the petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

IMPERIAL MACHINE & FOUNDRY CORPORATION v. THE UNITED STATES

[No. C-320. Decided May 9, 1927]

On the Proofs

Patents; vegetable-peeling machine.—The Robinson patent on vegetable-peeling machines, Letters Patent No. 809582, *held* valid, and infringed by the defendant. Case remanded for testimony as to damages. See companion cases, *post*, pp. 499, 502, 507, and 512.

The Reporter's statement of the case:

Messrs. Ralph M. Snyder and *Marvin Farrington* for the plaintiff. *Mr. Wallace R. Lane* and *King & King* were on the briefs.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. H. E. Knight* was on the brief.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The Imperial Machine & Foundry Corporation, plaintiff herein, is a corporation of the State of New York, having its principal place of business at Lindenhurst, Long Island, State of New York.

II. On January 7, 1905, Henry Robinson, a citizen of the United States, applied to the Commissioner of Patents for a patent on a machine for peeling vegetables, and on this application Letters Patent No. 809582 were issued to him January 9, 1906. A copy of the specifications of the said letters patent and drawings annexed thereto is attached to the petition as "Exhibit A" and made a part of this finding by reference thereto.

On January 16, 1906, the said Robinson assigned his right, title, and interest in and to said patent to the Robinson Machine Company, a corporation of the State of New Jersey.

On December 28, 1906, the Robinson Machine Company assigned its right, title, and interest in and to said patent to the Imperial Machine Company, a corporation of the State of New Jersey.

On September 27, 1917, the Imperial Machine Company sold its entire business and assets and assigned all its patents, including Letters Patent No. 809582, to the Imperial Machine & Foundry Corporation, plaintiff herein. Said assignment contained a provision that the assignee should have "the right to sue for and recover damages and profits in its own name for any and all past infringements of said letters patent."

III. Prior to January 7, 1905, the date of filing the application for said letters patent, there were in the art relating to potato and vegetable-peeling machines the inventions and devices illustrated and described by the following letters patent:

United States No. 91238 to Lehman.
United States No. 100348 to Williams.
United States No. 115264 to Mayhew.
United States No. 119746 to Culver.
United States No. 129741 to Loy & Baker.
United States No. 223056 to Mills.
United States No. 237599 to Raymond.

Reporter's Statement of the Case

United States No. 293047 to Mackey.
United States No. 336533 to Sylvester.
United States No. 524420 to Jaeger.
United States No. 551526 to Buist & Schmidt.
United States No. 686576 to Blache.
United States No. 777590 to DeBonneville.
United States No. 782852 to Imm.
United States No. 860349 to Brenizer.
British No. 10325 to DePass, issued 1886.
British No. 5435 to Schulte, issued 1886.
British No. 3040 to Lowe, issued 1894.

IV. The machine illustrated and described in the said Letters Patent 809582 consists of a cylinder at the bottom of which is mounted a rotary disk having an abrading striated surface provided with one or more rounded humps or raised portions which slope from the circumference of the disk towards the main portion thereof. The function of the rounded and sloping humps is to produce the necessary agitation and circulation of the mass of vegetables whereby all the vegetables are brought into contact with the abrading disk for the proper length of time to peel them.

V. The plaintiff and its predecessors made paring machines according to the design covered by the said patent, and have sold them throughout the United States and in foreign countries, and have continuously, since the issuance of the said patent, marked the said machines with the date and number of the said patent.

VI. The several and successive owners of the said patent have never granted licenses to make, use, or vend the device covered thereby.

VII. The plaintiff and its predecessors have on numerous occasions from the year 1906 to the fall of 1923 prepared and sent circulars to persons, firms, and corporations, including the makers of the "American" machine, hereinafter referred to, warning them not to infringe plaintiff's aforesaid patent or buy or use infringing apparatus, and have also verbally and in writing repeatedly and continuously during said period informed purchasing officers of various departments, bureaus, and independent agencies of the United States Government of plaintiff's rights under the

said patent. Some of the Federal officers so informed and warned were Paymaster General McGowan, U. S. N.; John Hancock, chief purchasing officer, Bureau of Supplies and Accounts, U. S. N.; Assistant Paymaster General Peoples, U. S. N.; Chief Purchasing Officer Cobey, Bureau of Supplies and Accounts, U. S. N.; and the purchasing officer for the United States Navy at Great Lakes Naval Training Station.

VIII. Since the year 1916 certain persons, firms, and corporations have been making and selling potato-peeling machines under trade names, respectively, of "American," "Sim-Peel-O," and "Economical."

Some of the said "American" machines contained as their essential part an abradant disk of the kind and character illustrated and described in the specifications and drawings of said Letters Patent No. 809582.

Suits were brought by the plaintiff or its predecessors for injunction and accounting against the manufacturers and sellers and some users of the said "American" machines and decrees obtained therein sustaining the validity of Letters Patent No. 809582, holding certain disks contained in said "American" machine to be an infringement thereof, and awarding profits and damages. Owing to the insolvency of the defendants, neither plaintiff nor its predecessors have received from the said manufacturers any damages or profits as a result of the said litigation.

IX. Since the year 1916 the defendant has bought for its use and has received from the manufacturers or sellers and used some of the said "American" machines that contained the said infringing abradant disk. The number of said machines and disks so purchased, received, and used does not appear, and there is no satisfactory proof of the dates of such purchase, receipt, and use.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a suit to recover damages for infringement of the plaintiff's patents by the defendant. The claim is based upon the purchase and use of machines which infringed these

patents. There are two questions for present purposes to be passed upon, viz, the validity of the patents, and the infringement thereof by the defendant by purchase and use.

Under the practice of this court the question of the amount of damages was postponed, no evidence to be taken thereon until these two questions have been disposed of; that is to say, if the court should decide the two questions in the affirmative, the case would proceed to the taking of evidence on the question of the amount of damages. The facts are fully set out in the findings, and it does not seem necessary to review them at length here. Briefly stated they are as follows:

Henry Robinson originated and put into commercial use a machine for peeling vegetables in bulk and obtained a patent therefor on January 9, 1906, being Patent No. 809582. This has been judicially determined to be a "pioneer patent."

On December 14, 1909, Robinson obtained a further patent for improvements in the machine for peeling vegetables, and Letters Patent No. 942932 were issued.

On January 16, 1906, Robinson transferred and assigned his interest in Patent No. 809582 to the Robinson Machine Co., which on December 28, 1906, assigned it to the Imperial Machine Co., a corporation, and on September 27, 1917, the latter sold its entire business and assets and assigned its interest in the said Patent 809582 and in all of its patents to the plaintiff, said latter assignment containing a provision giving the assignee "the right to sue for and recover damages and profits in its own name for any and all past infringements of said letters patent."

Patent No. 809582 consists of a cylinder with a rotary disk at the bottom. This disk has an abrading surface with one or more rounded humps or raised portions which slope from the rim or circumference toward the inner or main portion. The essence of the patent is in the rounded, sloping humps which extend from the rim toward the center of the disk. The process of peeling potatoes and other vegetables is the agitation and circulation of them so as to bring each potato into contact with the abrading surface for a proper length of time to completely peel it, and these sloping humps

produce the necessary agitation and circulation of the mass of vegetables so that all are brought into contact with the abrading disk. The rounded, sloping humps extending from the rim toward the center of the disk and the agitation and circulation of the vegetables so that each vegetable comes into contact with the abrading surface for the proper length of time to completely peel them are the soul of Robinson's basic invention.

Robinson's second patent, No. 942932, for improvements upon the vegetable-peeling machine, is an abrading disk having an upstanding lip or shoulder at the periphery to form scoop-shaped humps or waves with the raised portion of the disk. This represents a distinct improvement on Robinson's basic patent. It uses the essential features of the first patent and provides a new means for reducing waste in the operation of the machine. The upturned lip or edge of the outer periphery of the disk and the forming of scoop-shaped humps on the outer periphery of the raised portions impart another motion to the agitation of the vegetables and prevent the smaller vegetables from being crowded into the corner of the right angle that is formed by the outer edge of the disk and the sides of the cylinder; that is, it substitutes for an acute angle a curved surface and a scoop is formed at the junction with the sloping humps, thus increasing the agitation and circulation of the mass and preventing small vegetables from being ground to pieces at the periphery.

There are four companion suits to the one before us, being as follows: Nos. C–321, C–349, C–350, and 34453. In two of them, Nos. C–321 and C–350, the Imperial Machine Company is the plaintiff; the other two, Nos. C–349 and 34453, are brought by the plaintiff here. The first two are to recover damages for infringement by use prior to the assignment of the Imperial Machine Co. to the plaintiff, on September 27, 1917. What is said in this case as to the validity of the two patents will apply to all five of the cases, leaving only the question in each of the other cases, whether there was infringement by purchase and use of the machines by the defendant.

Nos. C–320, C–321, and 34453 involve only the question of the first patent and its infringement. Nos. C–349 and C–350, covering the sale of what was known as the " Sim-

Opinion of the Court

Peel-O" machine by the Albert Pick & Co., involve both of the patents. As the court has found in these two last cases that there was no proof of purchase or use by the defendant of the plaintiff's machine, it is unnecessary to discuss the question of the validity and infringement of the second patent, although this patent seems to have been fully sustained in suits against the Maxim Manufacturing Co., manufacturers of the "Sim-Peel-O" disk, by Judge Landis in the District Court of the United States for the Southern District of Illinois, Eastern Division, on February 27, 1922, and his decision was affirmed by the Circuit Court of Appeals for the Seventh Circuit in an opinion by Judge Page. *Maxim Manufacturing Co.* v. *Imperial Machine Co.*, 286 Fed. 79, 82. In this latter case the validity of both patents, particularly No. 809582, is considered. The court said:

"The Robinson patents, belonging to plaintiffs, have been many times before the courts, and the cited prior art patents hereinbefore referred to, and many others, have been often considered and generally rejected. The Robinson patent, No. 809582, was held to be a pioneer patent by Judge McPherson (note to 212 Fed. 959). That case was reversed by the Court of Appeals (*Am. Fruit Machinery Co. et al.* v. *Robinson Machine Co.*, 191 Fed. 723, 112 C. C. A. 313) solely on the construction of the word 'flat.' Defendant's disk there was a spiral one. Judge Mayer also held No. 809582 to be a pioneer patent. *Imperial Machine Co.* v. *Rees* (D. C.), 261 Fed. 612; *Imperial Machine Co.* v. *Am. Machinery Co.* (D. C.), 276 Fed. 436. At page 419, 262 Fed., is a list of cases where Patent No. 809582 has been held valid and infringed. We note that, while reliance is placed on anticipation in the prior art to defeat plaintiffs' patent, yet that defendant has departed so far from the disk forms of the prior art patents that its disk has now become almost a Chinese copy of plaintiffs' disk."

This view of the effect of the decisions cited is fully justified. This disposes of the question of the validity of Patent No. 809582 as affecting the three above-named cases, C-320, C-321, and 34453. Consideration will now be given to the question of infringement by use in the instant case.

The owners of these patents have found it necessary to litigate and relitigate their rights in the courts, and the plaintiff and its predecessors from the year 1906 to the fall

of 1923 prepared and sent circulars to persons, firms, and corporations, makers of the "American" machine, hereinafter referred to, warning them not to infringe the plaintiff's patent or to buy or use infringing apparatus, and also verbally and in writing repeatedly and continuously during this period informed the purchasing officers of the various bureaus and independent agencies of the United States Government of the plaintiff's rights under said patents. In this case the defendant, it is claimed, purchased infringing machines from the American Machinery Co. The latter company in the case of *Imperial Machine & Foundry Corporation* v. *American Machinery Co.*, 276 Fed. 436, was held to be an infringer of the plaintiff's patents by the manufacture and sale of the machines, some of which were sold to, purchased, and used by the defendant. Suits were brought by the plaintiff and its predecessors for injunctions and accounting against the manufacturers, sellers, and users, other than the defendant, of the "American" machines and decrees were obtained sustaining the validity of Letters Patent No. 809582 and holding the disks of the "American" machines to be an infringement thereof and awarding profits and damages. Plaintiff and its predecessors have never been able to recover any damages or profits from said manufacturers, owing apparently to their insolvency.

The court has found that since the year 1916 the defendant has bought for its use and has received from manufacturers or sellers and used some of the "American" machines which contain the said infringing abradant disk. This is as far as it is contemplated the case should proceed in its present stage. We hold that the patents involved here are valid, that as to this case they have been infringed, and that the machines manufactured and sold by the American Machine Co. and purchased at various times and used by the defendant were infringing machines upon the rights of the plaintiff, for which the latter is entitled to recover such damages as he may be able hereafter to prove, and the case is remanded for the taking of testimony upon the question only of the amount of damages.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

IMPERIAL MACHINE COMPANY v. THE UNITED STATES

[No. C-321. Decided May 9, 1927]

On the Proofs

Patents; vegetable-peeling machine.—See *Imperial Machine & Foundry Corporation* v. *United States*, *ante*, p. 491.

The Reporter's statement of the case:

Messrs. Ralph M. Snyder and *Marvin Farrington* for the plaintiff. *Mr. Wallace R. Lane* and *King & King* were on the briefs.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. H. E. Knight* was on the brief.

The court made special findings of fact, as follows:

I. The Imperial Machine Company, plaintiff herein, was a corporation organized under the laws of the State of New Jersey, with its principal place of business at Lindenhurst, Long Island, State of New York. On or about September 27, 1917, the said corporation sold its entire business and assets, including all its patents, among them Letters Patent No. 809582, hereafter described, to the Imperial Machine & Foundry Corporation, a corporation organized under the laws of the State of New York. The charter of the said Imperial Machine Company was revoked by the Secretary of State of the State of New Jersey on or about the 28th day of January, 1918, for nonpayment of taxes due said State, but said corporation retains its corporate existence for the purposes of this suit.

II. On January 7, 1905, Henry Robinson, a citizen of the United States, applied to the Commissioner of Patents for a patent on a machine for peeling vegetables, and on this application Letters Patent No. 809582 were issued to him January 9, 1906. A copy of the specifications of the said letters patent and drawings annexed thereto is attached to the petition as "Exhibit A" and made a part of this finding by reference thereto.

On January 16, 1906, the said Robinson assigned his right, title, and interest in and to the said patent to the Robinson Machine Company, a corporation of the State of New Jersey.

On December 28, 1906, the Robinson Machine Company assigned its right, title, and interest in and to said patent to the Imperial Machine Company, plaintiff herein.

III. Prior to January 7, 1905, the date of filing the application for said letters patent, there were in the art relating to potato and vegetable-peeling machines the inventions and devices illustrated and described by the following letters patent:

United States No. 91238 to Lehman.
United States No. 100348 to Williams.
United States No. 115264 to Mayhew.
United States No. 119746 to Culver.
United States No. 129741 to Loy & Baker.
United States No. 223056 to Mills.
United States No. 237599 to Raymond.
United States No. 293047 to Mackey.
United States No. 336533 to Sylvester.
United States No. 524420 to Jaeger.
United States No. 551526 to Buist & Schmidt.
United States No. 686576 to Blache.
United States No. 777590 to DeBonneville.
United States No. 782852 to Imm.
United States No. 860349 to Brenizer.
British No. 10325 to De Pass, issued 1886.
British No. 5435 to Schulte, issued 1886.
British No. 3040 to Lowe, issued 1894.

IV. The machine illustrated and described in the said Letters Patent 809582 consists of a cylinder at the bottom of which is mounted a rotary disk having an abrading striated surface provided with one or more rounded humps or raised portions which slope from the circumference of the disk towards the main portion thereof. The function of the rounded and sloping humps is to produce the necessary agitation and circulation of the mass of vegetables whereby all the vegetables are brought into contact with the abrading disk for the proper length of time to peel them.

V. The plaintiff and its predecessors made paring machines according to the design covered by the said patent and sold them throughout the United States and in foreign countries, and continuously, since the issuance of the said patent, marked the said machines with the date and number of the said patent.

VI. The several and successive owners of the said patent have never granted licenses to make, use, or vend the device covered thereby.

VII. On numerous occasions from the year 1906 to the time it sold its business and assets the plaintiff prepared and sent circulars to persons, firms, and corporations, including the makers and sellers of the "American" machine, hereinafter referred to, warning them not to make, sell, or use apparatus infringing plaintiff's aforesaid patent, and has also verbally and in writing repeatedly and continuously during said period informed purchasing officers of various departments, bureaus, and independent agencies of the United States Government of plaintiff's rights under the said patent, and warned them not to purchase machines that infringed the same.

VIII. Since the year 1916 certain persons, firms, and corporations have been making and selling potato-peeling machines under trade names, respectively, of "American," "Sim-Peel-O," and "Economical."

Some of the said "American" machines contained as their essential part an abradant disk of the kind and character illustrated and described in the specifications and drawings of said Letters Patent No. 809582.

Suits were brought by the plaintiff or its predecessors for injunction and accounting against the manufacturers and sellers and some users of the said "American" machines and decrees obtained therein sustaining the validity of Letters Patent No. 809582, holding certain disks contained in said "American" machine to be an infringement thereof, and awarding profits and damages. Owing to the insolvency of the defendants neither plaintiff nor its predecessors have received from the said manufacturers any damages or profits as a result of the said litigation.

IX. Since the year 1916 the defendant has bought for its use and has received from the manufacturers or sellers and used some of the said "American" machines that contained the said infringing abradant disk. The number of said machines and disks so purchased, received, and used does not appear, and there is no satisfactory proof of the dates of such purchase, receipt, and use.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case involves the question of the infringement by the defendant of patent No. 809582, and is controlled by the opinion this day handed down in the case of *Imperial Machine & Foundry Corporation* v. *United States*, No. C-320, *ante*, p. 491.

The court has found in this case that the defendant purchased and used machines which infringed on the plaintiff's patent, and the case is remanded for further proceedings on the question of the amount of damages for infringement.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

IMPERIAL MACHINE & FOUNDRY CORPORATION v. THE UNITED STATES

[No. 34453. Decided May 9, 1927]

On the Proofs

Patents; vegetable-peeling machine.—See ***Imperial Machine & Foundry Corporation*** v. ***United States, ante***, p. 491.

The Reporter's statement of the case:

Messrs. Ralph M. Snyder and *Marvin Farrington* for the plaintiff. *Mr. Wallace R. Lane* and *King & King* were on the briefs.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. H. E. Knight* was on the brief.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The Imperial Machine & Foundry Corporation, plaintiff herein, is a corporation of the State of New York, having its principal place of business at Lindenhurst, Long Island, State of New York.

II. On January 7, 1905, Henry Robinson, a citizen of the United States, applied to the Commissioner of Patents for a patent on a machine for peeling vegetables, and on this application Letters Patent No. 809582 were issued to him January 9, 1906. A copy of the specifications of the said letters patent and drawings annexed thereto is attached to the petition as "Exhibit A" and made a part of this finding by reference thereto.

On January 16, 1906, the said Robinson assigned his right, title, and interest in and to said patent to the Robinson Machine Company, a corporation of the State of New Jersey.

On December 28, 1906, the Robinson Machine Company assigned its right, title, and interest in and to said patent to the Imperial Machine Company, a corporation of the State of New Jersey.

On September 27, 1917, the Imperial Machine Company sold its entire business and assets, and assigned all its patents, including Letters Patent No. 809582, to the Imperial Machine & Foundry Corporation, plaintiff herein. Said assignment contained a provision that the assignee should have "the right to sue for and recover damages and profits in its own name for any and all past infringements of said letters patent."

III. Prior to January 7, 1905, the date of filing the application for said letters patent, there were in the art relating to potato and vegetable-peeling machines the inventions and devices illustrated and described by the following letters patent:

United States No. 91238 to Lehman.
United States No. 100348 to Williams.
United States No. 115265 to Mayhew.
United States No. 119746 to Culver.
United States No. 129741 to Loy & Baker.
United States No. 223056 to Mills.

United States No. 237599 to Raymond.
United States No. 293047 to Mackey.
United States No. 336533 to Sylvester.
United States No. 524420 to Jaeger.
United States No. 551526 to Buist & Schmidt.
United States No. 686576 to Blache.
United States No. 777590 to DeBonneville.
United States No. 782852 to Imm.
United States No. 860349 to Brenizer.
British No. 10325 to De Pass, issued 1886.
British No. 5435 to Schulte, issued 1886.
British No. 3040 to Lowe, issued 1894.

IV. The machine illustrated and described in the said Letters Patent 809582 consists of a cylinder at the bottom of which is mounted a rotary disk having an abrading striated surface provided with one or more rounded humps or raised portions which slope from the circumference of the disk toward the main portion thereof. The function of the rounded and sloping humps is to produce the necessary agitation and circulation of the mass of vegetables whereby all the vegetables are brought into contact with the abrading disk for the proper length of time to peel them.

V. The plaintiff and its predecessors made paring machines according to the design covered by the said patent, and have sold them throughout the United States and in foreign countries, and have continuously, since the issuance of the said patent, marked the said machines with the date and number of the said patent.

VI. The several and successive owners of the said patent have never granted licenses to make, use, or vend the device covered thereby.

VII. The plaintiff and its predecessors have on numerous occasions from the year 1906 to the fall of 1923 prepared and sent circulars to persons, firms, and corporations, including the makers of the "Economical" machine, hereinafter referred to, warning them not to infringe plaintiff's aforesaid patent or buy or use infringing apparatus, and have also verbally and in writing repeatedly and continuously during said period informed purchasing officers of

various departments, bureaus, and independent agencies of the United States Government of plaintiff's rights under the said patent. Some of the Federal officers so informed and warned were Paymaster General McGowan, U. S. N.; John Hancock, chief purchasing officer, Bureau of Supplies and Accounts, U. S. N.; Assistant Paymaster General Peoples, U. S. N.; Chief Purchasing Officer Cobey, Bureau of Supplies and Accounts, U. S. N.; and the purchasing officer for the United States Navy at Great Lakes Naval Training Station.

VIII. Since the year 1916 certain persons, firms, and corporations have been making and selling potato-peeling machines under trade names, respectively, of "American," "Sim-Peel-O," and "Economical."

Each of the said "Economical" machines contained as its essential part an abradant disk of the kind and character illustrated and described in the specifications and drawings of said Letters Patent No. 809582.

Suits were brought by the plaintiff or its predecessors foi injunction and accounting against the manufacturers and sellers and some users of the said "Economical" machines and decrees obtained therein sustaining the validity of Letters Patent No. 809582, holding the disk contained in said "Economical" machine to be an infringement thereof, and awarding profits and damages. Owing to the insolvency of the defendants, neither plaintiff nor its predecessors have received from the manufacturers or sellers and has used some as a result of the said litigation.

IX. Since 1916 the defendant has bought for its use and received from the manufacturers or sellers and has used some of the said "Economical" machines with the said infringing abradant disk. There is no proof of the number of said machines and disks so purchased, received and used, nor of the specific dates of purchase, receipt and use.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case involves the questions of the validity and infringement of plaintiff's patent No. 809582, and is ruled

by the case of *Imperial Machine & Foundry Corporation* v. *United States*, No. C–320, this day decided, *ante*, p. 491.

The owners of this patent have found it necessary to litigate and relitigate their rights in the courts, and the plaintiff and its predecessors from the year 1906 to the fall of 1923 prepared and sent circulars to persons, firms, and corporations, makers of the "Economical" machine, hereinafter referred to, warning them not to infringe the plaintiff's patent or to buy or use infringing apparatus, and also verbally and in writing repeatedly and continuously during this period informed the purchasing officers of the various bureaus and independent agencies of the United States Government of the plaintiff's rights under said patent.

This case covers claims connected with the purchase and use by the defendant of infringing machines known as the "Economical" machine and involving the said patent No. 809582. This "Economical" machine was held to be an infringement of plaintiff's patent on March 3, 1919, in the case of *Imperial Machine Co.* v. *Rees & Stindt Machine Works* and *Belding & Franklin Machine Co.* in equity No. 15–305, United States District Court for the Southern District of New York. The case was decided by Judge Hand without an opinion. This suit was afterwards consolidated with the suit of the *Imperial Machine Co.* v. *Metropolitan Life Insurance Co.*, 261 Fed. 612, involving the use of the said "Economical" machine, and in quite a full opinion Judge Mayer held it to be an infringement of the plaintiff's patent No. 809582.

It must therefore be held that the purchase and use of the "Economical" machines by the Government would render it liable for damages, and the court has found that the defendant did purchase and use said machines, and the case is remanded for further proceedings on the question of the amount of damages for infringement.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

Reporter's Statement of the Case

IMPERIAL MACHINE & FOUNDRY CORPORATION v. THE UNITED STATES

[No. C-349. Decided May 9, 1927]

On the Proofs

Patents; vegetable-peeling machine.—The court finds upon the proof no purchase or use by the defendant of the vegetable-peeling machine known in the trade as "Sim-Peel-O," which is alleged to infringe Letters Patent Nos. 809582 and 942932 issued to Robinson. See *ante*, p. 491.

The Reporter's statement of the case:

Messrs. Ralph M. Snyder and *Marvin Farrington* for the plaintiff. *Mr. Wallace R. Lane* and *King & King* were on the briefs.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. H. E. Knight* was on the brief.

The court made special findings of fact, as follows:

I. The Imperial Machine & Foundry Corporation, plaintiff herein, is a corporation of the State of New York, having its principal place of business at Lindenhurst, Long Island, State of New York.

II. On January 7, 1905, Henry Robinson, a citizen of the United States, applied to the Commissioner of Patents for a patent on a machine for peeling vegetables, and on this application Letters Patent No. 809582 were issued to him January 9, 1906. A copy of the specifications of the said letters patent and drawings annexed thereto is attached to the petition as "Exhibit A" and made a part of this finding by reference thereto.

On January 16, 1906, the said Robinson assigned his right, title, and interest in and to the said patent to the Robinson Machine Company, a corporation of the State of New Jersey.

On December 28, 1906, the Robinson Machine Company assigned its right, title, and interest in and to said patent to

the Imperial Machine Company, a corporation of the State of New Jersey.

On November 12, 1908, the said Henry Robinson applied to the Commissioner of Patents for new and useful improvements in vegetable-paring machines, and on this application Letters Patent No. 942932 were issued to him December 14, 1909. A copy of the specifications of said letters patent and drawings annexed thereto is attached to and made a part of these findings as Appendix I.

On February 7, 1912, the said Robinson assigned his right, title, and interest in and to the said patent to the Imperial Machine Company.

On September 27, 1917, the Imperial Machine Company sold its entire business and assets, and assigned all its patents, among them Letters Patent No. 809582 and No. 942932, to the Imperial Machine & Foundry Corporation, plaintiff herein. Said assignment contained a provision that the assignee should have "the right to sue for and recover damages and profits in its own name for any and all past infringements of said letters patent."

III. Prior to January 7, 1905, the date of filing the application for letters patent, thereafter granted as No. 809582, there were in the art relating to potato and vegetable-peeling machines the inventions and devices illustrated and described by the following letters patent:

United States No. 91238 to Lehman.
United States No. 100348 to Williams.
United States No. 115264 to Mayhew.
United States No. 119746 to Culver.
United States No. 129741 to Loy & Baker.
United States No. 223056 to Mills.
United States No. 237599 to Raymond.
United States No. 293047 to Mackey.
United States No. 336533 to Sylvester.
United States No. 524420 to Jaeger.
United States No. 551526 to Buist & Schmidt.
United States No. 686576 to Blache.
United States No. 777590 to DeBonneville.
United States No. 782852 to Imm.
United States No. 860349 to Brenizer.

British No. 10825 to De Pass, issued 1886.
British No. 5435 to Schulte, issued 1886.
British No. 3040 to Lowe, issued 1894.

Prior to November 12, 1908, the date of filing the application for letters patent, thereafter granted as No. 942932, there were in the art relating to potato and vegetable-peeling machines the inventions and devices illustrated and described in the foregoing letters patent, including Letters Patent No. 809582, and in addition thereto those illustrated and described in the following letters patent:

United States No. 842993 to Archer.
United States No. 855481 to Robinson.
United States No. 922382 to Brenizer.
United States No. 999478 to Archer.

IV. The machine illustrated and described in said Letters Patent No. 809582 consists of a cylinder at the bottom of which is mounted a rotary disk having a striated abrading surface provided with one or more rounded humps or raised portions which slope from the circumference of the disk toward the main portion thereof. The function of the rounded and sloping humps is to produce the necessary agitation and circulation of the mass of vegetables whereby all the vegetables are brought into contact with the abrading disk for the proper length of time to peel them.

Claims 1 and 2 of Letters Patents No. 942932, which are the claims alleged by the plaintiff to be infringed, are described as follows:

"1. In a mechanism of the character described, a rotary horizontal abradant member having a substantially flat abradant surface of broken crystalline material, the surface being broken with a plurality of peripheral scoop-shaped humps or waves, said waves extending outwardly from a point intermediate of the center and periphery of the member.

"2. In a machine of the character described, a rotary abrading member having a substantially flat surface and an upwardly projecting concave peripheral lip."

The function of the humps described in Letters Patent No. 942932 is the same as in Letters Patent No. 809582 with the following improvement: The scoop-shaped peripheral humps

and the upwardly projecting concave peripheral lip impart another motion to the vegetables which prevents small vegetables from being crowded into the angle formed by the disk with the sides of the cylinder and there ground to pieces.

V. The plaintiff and its predecessors made paring machines according to the design covered by the said patents, have sold them throughout the United States and in foreign countries, and have continuously, since the issuance of the said patents, marked the said machines with the dates and numbers of the patents.

VI. The several and successive owners of the said patents have never granted licenses to make, use, or vend the devices covered thereby.

VII. The plaintiff and its predecessors have on numerous occasions from the year 1906 to the fall of 1923 prepared and sent circulars to persons, firms, and corporations, including the makers of the "Sim-Peel-O" machine, hereinafter referred to, warning them not to make, sell or use apparatus infringing plaintiff's aforesaid patents, and have also verbally and in writing repeatedly and continuously during said period informed purchasing officers of various departments, bureaus and independent agencies of the United States Government of plaintiff's rights under the said patent and warned them not to purchase machines that infringed the same. Some of the Federal officers so informed and warned were Paymaster General McGowan, U. S. N.; John Hancock, chief purchasing officer, Bureau of Supplies and Accounts, U. S. N.; Assistant Paymaster General Peoples, U. S. N.; Chief Purchasing Officer Cobey, Bureau of Supplies and Accounts, U. S. N.; and the purchasing officer for the United States Navy at Great Lakes Naval Training Station.

VIII. Since the year 1916 certain persons, firms and corporations have been making and selling potato-peeling machines under trade names, respectively, of "American," "Sim-Peel-O," and "Economical."

The said "Sim-Peel-O" machine contained as its essential part an abradant disk of the kind and character illustrated and described in the specifications and drawings of said Letters Patent Nos. 809582 and 942932.

Suits were brought by the plaintiff and its predecessors for injunction and accounting against the manufacturers and sellers and some users of the said "Sim-Peel-O" machines and decrees obtained therein sustaining the validity of Letter Patent Nos. 809582 and 942932, holding said "Sim-Peel-O" machine to be an infringement thereof, and awarding profits and damages. Owing to the insolvency of the defendants, neither plaintiff nor its predecessors have received from the said manufacturers any damages or profits as a result of said litigation.

IX. One of the distributors of the "Sim-Peel-O" machine was Albert Pick & Company. The plaintiff, by its president and attorney, executed and filed a release and waiver in Equity Suit No. 2636 in the United States District Court, Northern District of Illinois, Eastern Division, entitled *Imperial Machine & Foundry Corporation* v. *Albert Pick & Company*, containing the following:

"Now, therefore, in consideration of the sum of twenty thousand ($20,000) dollars in hand paid, the receipt of which is hereby acknowledged, the plaintiff, Imperial Machine & Foundry Corporation, hereby releases and entirely relieves the defendant, Albert Pick & Company, and all sellers and users of the vegetable-peeling and paring machines held to be an infringement of said patents sold by said Albert Pick & Company previous to November 19, 1923, from any and all claims for profits and damages of every nature whatsoever which have arisen or may arise out of said Albert Pick & Company's sale or use of said infringing vegetable-peeling or paring machines, or by the use of said infringing vegetable-peeling or paring machines by others who have purchased said machines; and agrees to discontinue the accounting proceeding pending relative thereto.

"This release does not in any wise relieve the party or parties manufacturing said infringing vegetable-peeling or paring machines, whether sold to Albert Pick & Company or otherwise, from full responsibility for their infringing acts in connection with their manufacture and sale of said infringing machines. * * *

"Said Imperial Machine & Foundry Corporation will and does hereby release all Government agencies purchasing such infringing machines from Albert Pick & Company previous to November 19, 1923, and will remit in any suit now pending against the Government or any of its agencies, any claim

for damages or profits arising out of the use of any of said infringing machines thus purchased from Albert Pick & Company."

X. There is no satisfactory proof that the defendant has purchased, received, or used any of the said potato-peeling machines known in the trade as "Sim-Peel-O," containing abradant disks of the kind and character described in plaintiff's said patents, or that any of them have been manufactured by or for the United States.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a companion case of four others, between the same parties, involving the validity and infringement of Letters Patent 809582 and 942932, the property of the plaintiff. The question of the validity of these patents has been discussed and passed upon in the opinion filed by the court in C–320, handed down this day (*ante*, p. 491), so that it is unnecessary to consider this question again. Inasmuch as the court has found that there is no proof of infringement by purchase and use by the defendant, it is unnecessary to consider the question of infringement. The petition should therefore be dismissed, and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

IMPERIAL MACHINE COMPANY v. THE UNITED STATES

[No. C–350. Decided May 9, 1927]

On the Proofs

Patents; vegetable-peeling machine.—See *Imperial Machine & Foundry Corporation* v. *United States*, *ante*, p. 507.

The Reporter's statement of the case:

Messrs. Ralph M. Snyder and *Marvin Farrington* for the plaintiff. *Mr. Wallace R. Lane* and *King & King* were on the briefs.

Reporter's Statement of the Case

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. H. E. Knight* was on the brief.

The court made special findings of fact, as follows:

I. The Imperial Machine Company, plaintiff herein, was a corporation organized under the laws of the State of New Jersey, with its principal place of business at Lindenhurst, Long Island, State of New York. On or about September 27, 1917, the said corporation sold its entire business and assets, including all its patents, among them Letters Patent No. 809582, hereinafter described, to the Imperial Machine & Foundry Corporation, a corporation organized under the laws of the State of New York. The charter of the said Imperial Machine Company was revoked by the Secretary of State of the State of New Jersey on or about the 28th day of January, 1918, for nonpayment of taxes due said State, but said corporation retains its corporate existence for the purposes of this suit.

II. On January 7, 1905, Henry Robinson, a citizen of the United States, applied to the Commissioner of Patents for a patent on a machine for peeling vegetables, and on this application Letters Patent No. 809582 were issued to him January 9, 1906. A copy of the specifications of the said letters patent and drawings annexed thereto is attached to the petition as "Exhibit A" and made a part of this finding by reference thereto.

On January 16, 1906, the said Robinson assigned his right, title, and interest in and to the said patent to the Robinson Machine Company, a corporation of the State of New Jersey.

On December 28, 1906, the Robinson Machine Company assigned its right, title, and interest in and to said patent to the Imperial Machine Company, plaintiff herein.

III. Prior to January 7, 1905, the date of filing the application for said letters patent, there were in the art relating to potato and vegetable-peeling machines the inventions and devices illustrated and described by the following letters patent:

United States No. 91238 to Lehman.

United States No. 100348 to Williams.

United States No. 115264 to Mayhew.
United States No. 119746 to Culver.
United States No. 129741 to Loy & Baker.
United States No. 223056 to Mills.
United States No. 237599 to Raymond.
United States No. 293047 to Mackey.
United States No. 336533 to Sylvester.
United States No. 524420 to Jaeger.
United States No. 551526 to Buist & Schmidt.
United States No. 686576 to Blache.
United States No. 777590 to De Bonneville.
United States No. 782852 to Imm.
United States No. 860349 to Brenizer.
British No. 10325 to De Pass, issued 1886.
British No. 5435 to Schulte, issued 1886.
British No. 3040 to Lowe, issued 1894.

IV. The machine illustrated and described in the said Letters Patent 809582 consists of a cylinder at the bottom of which is mounted a rotary disk having an abrading striated surface provided with one or more rounded humps or raised portions which slope from the circumference of the disk toward the main portion thereof. The function of the rounded and sloping humps is to produce the necessary agitation and circulation of the mass of vegetables whereby all the vegetables are brought into contact with the abrading disk for the proper length of time to peel them.

V. The plaintiff and its predecessors made paring machines according to the design covered by the said patent and sold them throughout the United States and in foreign countries, and continuously, since the issuance of the said patent, marked the said machines with the date and number of the said patent.

VI. The several and successive owners of the said patent have never granted licenses to make, use, or vend the device covered thereby.

VII. On numerous occasions from the year 1906 to the time it sold its business and assets the plaintiff prepared and sent circulars to persons, firms, and corporations, including the makers and sellers of the "Sim-Peel-O" machine, hereinafter referred to, warning them not to make,

sell, or use apparatus infringing plaintiff's aforesaid patent, and has also verbally and in writing repeatedly and continuously during said period informed purchasing officers of various departments, bureaus, and independent agencies of the United States Government of plaintiff's rights under the said patent, and warned them not to purchase machines that infringed the same.

VIII. Since the year 1916 certain persons, firms, and corporations have been making and selling potato-peeling machines under trade names, respectively, of "American," "Sim-Peel-O," and "Economical."

The said "Sim-Peel-O" machine contained as its essential part an abradant disk of the kind and character illustrated and described in the specifications and drawings of said Letters Patent No. 809582.

Suits were brought by the plaintiff for injunction and accounting against the manufacturers and sellers and some users of the said "Sim-Peel-O" machines and decrees obtained therein sustained the validity of Letters Patent No. 809582, holding said "Sim-Peel-O" machine to be an infringement thereof, and awarding profits and damages. Owing to the insolvency of the defendants, neither plaintiff nor its predecessors have received from the said manufacturers any damages or profits as a result of the said litigation.

IX. One of the distributors of the "Sim-Peel-O" machines was Albert Pick & Company. The plaintiff's successor in interest, the said Imperial Machine & Foundry Corporation, executed and filed a release and waiver in Equity Suit No. 2636 in the United States District Court, Northern District of Illinois, Eastern Division, entitled *Imperial Machine & Foundry Corporation* v. *Albert Pick & Company*, containing the following:

"Now, therefore, in consideration of the sum of twenty thousand ($20,000) dollars in hand paid, the receipt of which is hereby acknowledged, the plaintiff, Imperial Machine & Foundry Corporation, hereby releases and entirely relieves the defendant, Albert Pick & Company, and all sellers and users of the vegetable-peeling and paring machines held to be an infringement of said patents sold by said Albert Pick & Company previous to November 19, 1923, from any and

all claims for profits and damages of every nature whatsoever which have arisen or may arise out of said Albert Pick & Company's sale or use of said infringing vegetable-peeling or paring machines, or by the use of said infringing vegetable-peeling or paring machines by others who have purchased said machines; and agrees to discontinue the accounting proceeding pending relative thereto.

"This release does not in any wise relieve the party or parties manufacturing said infringing vegetable-peeling or paring machines, whether sold to Albert Pick & Company or otherwise, from full responsibility for their infringing acts in connection with their manufacture and sale of said infringing machines * * *

"Said Imperial Machine & Foundry Corporation will and does hereby release all Government agencies purchasing such infringing machines from Albert Pick & Company previous to November 19, 1923, and will remit in any suit now pending against the Government or any of its agencies, any claim for damages or profits arising out of the use of any of said infringing machines thus purchased from Albert Pick & Company."

X. There is no satisfactory proof that the defendant has purchased, received, or used any of the said potato-peeling machines known in the trade as "Sim-Peel-O," containing abradant disks of the kind and character described in plaintiff's said patents, or that any of them have been manufactured by or for the United States.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is one of five cases between the same parties involving the validity and infringement of Letters Patent 809582 and 942932, the property of the plaintiff. The question of the validity of these patents has been discussed and passed upon in the opinion filed by the court in No. C–320, handed down this day (*ante*, p. 491), so that it is unnecessary to consider this question again. Inasmuch as the court has found that there is no proof of infringement by purchase and use by the defendant it is unnecessary to consider the question of infringement. The petition should therefore be dismissed, and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

CARLEY LIFE FLOAT COMPANY v. THE UNITED STATES

[No. 34647. Decided May 9, 1927]

On the Proofs

Patents; improvements in life rafts.—The Carley patent on improvements in life rafts, Letters Patent No. 734118, *held* valid and infringed by the defendant. Case remanded for proof as to damages.

Same; infringement; change in form.—A user may not escape infringement by a mere change in form of the patented article, requiring no originality and having no substantial change in result or functioning of elements.

The Reporter's statement of the case:

Messrs. Reeve Lewis and *Philip Mauro* for the plaintiff. *Messrs. S. T. Cameron* and *W. B. Kerkam* were on the briefs.

Mr. Daniel L. Morris, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Harry E. Knight* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation created and existing under the laws of the State of West Virginia, having an office in the city of Philadelphia, Pennsylvania, and another office and its manufacturing plant at Cambridgeport, Massachusetts.

II. On the 14th day of May, 1902, Horace S. Carley, a citizen of the United States, a practical sailor, residing at Hyde Park, State of Massachusetts, filed an application with the Commissioner of Patents for letters patent on certain alleged new and useful improvements in life rafts.

III. By an instrument in writing dated, executed, and delivered the 18th day of June, 1903, and duly recorded in the United States Patent Office, said Horace S. Carley sold, assigned, and transferred to the plaintiff, the Carley Life Float Company, its successors or assigns, the entire right, title, and interest in and to his said application, the invention and improvements described therein, and the patent to be granted thereon to the end of its term.

IV. The said application was allowed, and on July 21, 1903, letters patent thereon were regularly granted and issued

by the Commissioner of Patents, numbered 734118, to the said Carley, as assignor to Carley Life Float Company, plaintiff herein. At all times from the date of the assignment aforesaid and the grant and issuance of said letters patent, and until the expiration thereof subsequent to the filing of this suit, plaintiff was the exclusive owner of said letters patent and invention and of the entire right, title, and interest therein.

A copy of said Letters Patent No. 734118 is attached to these findings and made a part thereof as Appendix A.

V. Claims 1, 2, 3, and 4 of the said letters patent are as follows:

"1. In a collapsible, reversible life raft, a buoyant body of annular or similar continuous form, a bottom, a flexible part secured at one edge around the edge of the bottom, rings or eyelets arranged at suitable intervals along the other edge of said flexible part, flexible rings around the buoyant body passing through the eyelets on the flexible part, and draw ropes extending longitudinally along the buoyant body attached to the flexible rings and drawing the same tightly against the outer surface of said body but leaving them loose at the inner surface thereof so that the eyelets or rings on the flexible part can run freely on the flexible rings.

"2. In a collapsible reversible life raft, a buoyant body of annular or similar continuous form, a bottom, a flexible part secured at one edge around the edge of the bottom, rings or eyelets arranged at suitable intervals along the other edge of said flexible part, flexible rings around the buoyant body passing through the eyelets on the flexible part, a rope extending longitudinally around the outer surface or periphery of the buoyant body and connected to the flexible rings, and draw ropes extending longitudially along the buoyant body attached to the flexible rings and drawing the same tightly against the outer surface of said body, but leaving them loose at the inner surface thereof, so that the eyelets or rings on the flexible part can run freely on the flexible rings.

"3. In a collapsible reversible life raft, a buoyant body of annular or similar continuous form, a bottom, a flexible part secured at one edge around the edge of the bottom, rings or eyelets arranged at suitable intervals along the other edge of said flexible part, flexible rings around the buoyant body passing through the eyelets on the flexible part, a rope extending longitudinally around the outer surface of the buoyant body and passing through small rings or eyelets on the

flexible rings, respectively, and draw ropes extending longitudinally along the buoyant body attached to the flexible rings and drawing the same tightly against the outer surface of said body, but leaving them loose at the inner surface thereof, so that the eyelets or rings on the flexible part can run freely on the flexible rings.

"4. In a collapsible reversible life raft, a buoyant body of annular or similar continuous form, a bottom, a flexible part secured at one edge around the edge of the bottom, rings or eyelets arranged at suitable intervals along the other edge of said flexible part, flexible rings around the buoyant body passing through the eyelets on the flexible part, said flexible rings being formed of rope having a loop at one end passing through a loop at its other end, a small ring on each of the first-mentioned loops, a rope extending longitudinally around the outer surface of the buoyant body and passing through the small rings on the flexible rings, and draw ropes extending longitudinally along the upper and lower sides of the buoyant body attached to the flexible rings and drawing the same tightly around the outer surface of said body, but leaving them loose at the inner surface thereof, so that the eyelets or rings on the flexible part can run freely on the flexible rings."

VI. Prior to and at the time of the said application of Horace S. Carley, dated May 14, 1902, there were in the art to which said Letters Patent No. 734118 relate the following letters patent:

Serial No.	Device	Patentee	Date patent issued
10766	Reversible lifeboat	Thompson	Apr. 11, 1854
185784	Life raft	Davies	Feb. 11, 1873
155500	Life raft	Cone	Sept. 29, 1874
208360	Deep-water safety baths	Bamber	Sept. 24, 1878
227054	Life raft	Raymond and Roberts	Apr. 27, 1880
456621	Life preserver	Köpcke	July 28, 1891
627979	Life boat	Carley	July 4, 1899
671502	Life boat	Sultemeyer	Apr. 9, 1901

With the exception of Patent No. 10766, the foregoing were cited by the examiner of the Patent Office in the proceedings before him upon the aforesaid application for letters patent.

VII. Theretofore, on or about June 27, 1900, the plaintiff received an order from the Navy Department to manufacture and furnish an experimental lot of life rafts. The

plaintiff proceeded with the order, and it was completed under contract by the Chase-Shawmut Company. The rafts so constructed were substantially in accordance with the design covered by Letters Patent No. 627979, listed in Finding VI, with details in structure suggested by the inventor, the said Horace S. Carley. This type is illustrated in Appendix B, which is attached to and made a part of these findings. It proved defective, the manufacture of it was abandoned, and it was rejected by the Navy Department for use in the Navy. Its greatest and principal defect was the damage to the buoyant body caused by the loosening or tearing out of eyebolts which were inserted therein for the purpose of securing the rigging.

VIII. Life rafts constituting plaintiff's earliest commercial embodiments of the invention of the patent in suit were manufactured and sold thereafter by the plaintiff to its customers, proved satisfactory, and their type is shown in Appendix C hereto, which is made a part of these findings. In this type the aforesaid fixed eyebolts were abandoned, so that the rigging slung from the buoyant body was not rigidly attached thereto as before. Flexible rope rings spaced at intervals along the buoyant body were attached at the top and bottom thereof by means of a seizing or binding to two draw ropes extending severally over and below the buoyant body longitudinally.

When the said several draw ropes were tightened it had the effect of binding the rope rings to the outward side of the buoyant body and leaving a slack in them on the inside. Each of the rope rings was made of a piece of rope having loops at both ends, and one looped end was threaded through the eye of the other, leaving one loop free. The free loops were all placed on the outward side of the buoyant body and through them was run a "bumper" or "backbone" rope extending longitudinally around the extreme periphery of the buoyant body, serving as a tie to the rope rings, keeping them from shifting, a means for the attachment of life lines, and in a measure binding the flexible rope rings to the buoyant body where the "bumper" or "backbone" rope passed through their loops. The net and platform, or

basket, was connected with and slung from the slack of the flexible rope rings, on the inside of the buoyant body, by means of metal rings, so that the entire contrivance could be easily reversed and the basket lowered down into the water no matter on which side the raft alighted.

In the summer of 1902 the plaintiff without expense to the Navy Department replaced the rafts hitherto furnished it of the first or eyebolt type with the later type, immediately above described, in so far as rafts of the older type could be recovered, and between February and May, 1903, sold to the Navy Department 16 additional rafts of the said later type.

IX. Thereafter, beginning in or about the month of December, 1903, the plaintiff modified the aforesaid draw-rope structure by passing or lacing additional draw ropes in a zigzag course longitudinally along the inside of the buoyant body and engaged with the top and bottom of each rope ring by passing said additional draw ropes through additional loops made in the rope rings for that purpose, and in such manner that upon the zigzag draw ropes being made taut the rope rings were tightened against the outward surface of the buoyant body and loosened or slackened on the inside thereof. This modified type is illustrated in Appendix D hereto, which is made a part of these findings. It has since been employed in all life floats or life rafts manufactured by the plaintiff or its agents.

X. Within six years next preceding the filing of the petition herein the defendant entered into contracts with the Athens Shipbuilding Corporation, a corporation of the State of New York, for the furnishing and delivery to the United States at the navy yard, Brooklyn, New York, of "elliptical tubular life floats" as follows:

Contract serial No.	Date	Number of floats	Price
39629	July 15, 1918	4,500	$1,242,500.00
39629A	Oct. 30, 1918	170	39,950.00
44479	Nov. 27, 1918	250	58,750.00
45257	Dec. 23, 1918	1,400	284,200.00
			1,625,400.00

XI. The life rafts or floats furnished and delivered under the aforesaid contracts with the Athens Shipbuilding Corporation were substantially of the kind and character manufactured by the plaintiff beginning in or about December, 1903, described in Finding IX herein. From the Athens float was omitted the two longitudinal draw ropes extending around the buoyant body at the top and bottom thereof attached to the several rope rings, the Athens float relying on the rigging otherwise to bind the rope rings to the outward surface of the float and keep them slack on the inside. There was an immaterial variation in the manner of constructing the rope rings.

The Athens type of life raft so furnished and delivered is illustrated in Appendices E, F, and G, which are annexed to and made a part of these findings.

The plaintiff had prior to the contracts let to the Athens Co. manufactured floats employing the zigzag lacing method.

XII. On March 20, 1919, the plaintiff, by its attorneys, presented a claim to the Munitions Patents Board against the defendant for compensation for alleged use and manufacture of its invention as embodied in Letters Patent No. 734118, arising out of the aforesaid transactions with the Athens Shipbuilding Corporation. The said Munitions Patents Board found adversely to the plaintiff, its action was approved by the Acting Secretary of the Navy January 23, 1920, and the plaintiff was so notified. The said attorneys responded February 18, 1920, to this notice and stated that it was the intention of plaintiff to submit the matter to this court. Copies of the said claim and correspondence relative thereto are attached to the petition as Exhibits D, E, F, and G, which are made a part of these findings by reference thereto.

XIII. On or about July 27, 1918, the plaintiff, by letter, notified the defendant as follows:

JULY 27, 1918.

Rear Admiral D. W. TAYLOR,
Bureau of Construction and Repair,
United States Navy, Washington, D. C.

DEAR SIR: In connection with the bids recently submitted to the Government for life floats, we understand that the

impression prevails that the patents under which the standard Carley life float is manufactured have expired. We wish to call your attention to the fact that this is an error. United States patent No. 734118, granted to the Carley Life Float Company July 21st, 1903, and under which standard Carley life floats are manufactured, is still in full force and effect. Edwin A. Benchley, Inc., of Boston, Mass., is the only concern that is authorized to construct Carley life floats under this patent.

We submit this statement for the purpose of correcting the erroneous impression which we understand prevails in regard to the expiration of the Carley life-float patents.

Respectfully,

CARLEY LIFE FLOAT COMPANY,
By A. THOMPSON, *President.*

XIV. The plaintiff has not at any time authorized or licensed the defendant to make or use the invention described in said Letters Patent No. 734118, and has not received from the defendant any royalty or compensation on account thereof in connection with the life floats furnished and delivered under the contracts with the Athens Shipbuilding Corporation, mentioned in Finding X, *supra.*

XV. The "elliptical tubular life floats" required under the aforesaid contracts with the Athens Shipbuilding Corporation to be furnished and delivered, and described in the specifications thereof, are of the kind and character described in Letters Patent No. 734118 and infringe one or more of claims 1, 2, 3, and 4 thereof.

XVI. All life rafts or floats manufactured and sold by the plaintiff or its agents under Letters Patent No. 734118 had affixed thereon the following:

"Pat. * * , July 21, '03."

The Bureau of Construction and Repair, Navy Department, prepared the specifications which formed a part of the aforesaid contracts with the Athens Shipbuilding Corporation, and was aware of and endeavored in designing the float for actual use to avoid infringing the claims set out in the letters patent in suit.

XVII. The plaintiff has at various times furnished and delivered to the defendant under contracts therewith a great

number of life rafts of the kind and character described in Letters Patent No. 734118, having draw ropes arranged as described in Findings VIII and IX, either or both; tests made of them by the Navy were satisfactory, and they were accepted and paid for in due course.

The court decided that plaintiff was entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

Plaintiff company, a West Virginia corporation, sues to recover for an alleged infringement of a patented device. On May 14, 1902, Horace S. Carley filed an application for letters patent on certain new and useful improvements in life rafts. On June 18, 1903, Carley duly assigned to plaintiff his title and interest in said application; and on July 21, 1903, letters patent were granted to Carley and duly issued as No. 734118. This litigation is the result of a series of contracts entered into by the Government with the Athens Shipbuilding Corporation of New York for the manufacture and delivery to the Government of a number of "elliptical tubular life floats." The plaintiff contends that the life floats manufactured by the Athens Company for the Government under the above contracts are duplicate copies and exact reproductions of the life float covered by Letters Patent No. 734118. The findings set forth claims 1, 2, 3, and 4 of Carley's patent—i e., the claims involved. The defendant rests its case upon two primary defenses: First, claims 1, 2, 3, and 4 are challenged as invalid because they recite an inoperative structure, one lacking in utility and anticipated by the prior art. Second, granting the validity of the claims, they were not infringed by the defendant for the reason of nonuser. The record is a large one. Carley was a practical sailor. He became interested in life-saving devices prior to 1899, for, as appears from Finding VI, he secured on July 4, 1899, a patent for a lifeboat.

The prior art discloses that antedating Carley's advent into the field there existed at least four types of life-saving apparatus, (1) lifeboats capable of expeditious launching from the decks of ships; (2) life rafts to be thrown overboard from the deck of the ship, or to be loaded with pas-

sengers and float off when the ship sank; (3) individual life preservers adjustable to the body and capable of sustaining persons afloat in the water, and (4) life buoys, a circular device to be thrown overboard and grasped by a person in the water. Carley originally conceived the idea of deviating from the existing types in the important particular of designing a collapsible and reversible life float capable of performing a service superior in extent to and available with greater expedition than anything which had gone on before. What he was seeking to do was to construct a life float so compact when collapsed that great numbers could be readily carried aboard ship, and when cast overboard in times of excitment and emergency would not fail to operate, accommodating the maximum number of passengers. To this end the inventor designed his first float, and, as much stress is put upon the claims of patent No. 627979 as anticipatory of certain elements in the patent in suit, discussion of the same becomes important.

Carley's first patent, No. 627979, is illustrated by the accompanying figure.

The predominating ideas of the inventor in this patent are illustrated in the attempt to specify and construct a lifeboat collapsible, reversible, noncapsizable, and of sufficient strength to withstand the pressure of sudden usage at sea. Departing from the raft type of life-saving devices, Carley was impressed with the making of a float more in keeping with the lifeboat type, wherein he employs a suspended platform or bottom by means of a flexible netting attached to the inner side of a buoyant frame, resulting in a partial submergence of the passengers utilizing the same. Reversibility was a new idea. Carley's patent illustrates the conception; no matter which side of the buoyant frame strikes the water, the float is available immediately. To accomplish the result, the claims of the patent disclose a construction embodying an elliptical float body; i. e., buoyant body around which is encircled at intervals rings d^2 of rope or metal, fitting loosely. Upon each of the loose-fitting rings d^2 inside the float body is attached slidable eyelet d^1, which are also attached to the upper edge of the netting,

Opinion of the Court

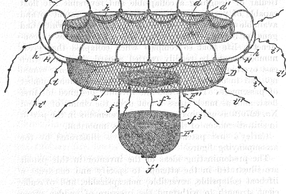
No. 627,979. Patented July 4, 1899.

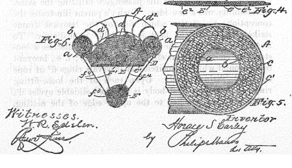
H. S. CARLEY.

LIFE BOAT.

(Application filed Apr. 23, 1898.)

(No Model.)





Opinion of the Court

which in turn supports the bottom, thereby resulting in a degree of slack sufficient in extent to allow the free movement of the eyelets along the encircling rings of metal or rope on the inside of the buoyant body through which the bottom of the device may pass, irrespective of contact with the water. Obviously the encircling rings of rope or metal come in close contact with the buoyant body at but one point, and that is at the top thereof. To provide against the longitudinal displacement of the encircling rings of rope or metal, Carley employed in this patent a series of eyebolts, h, securely attached to the outside of the buoyant body by perforation of the same, and through which the encircling rings passed, and through which life rope H was likewise passed, the inventor specifying life line H as "attached at intervals in eyelets h, through which rings d^2 pass." The difficulty which this device encountered lay primarily in the construction of the encircling rings and their attachment to the buoyant body. It was indispensable to so adjust the parts of the device as to in no way impede the free and easy movement of the bottom of the float through the buoyant body in either direction. To do this required the maintenance of almost perfect alignment of the bottom supported by the netting with the bouyant body. Carley's encircling rings in this patent failed to respond to the necessities of the case; the eyebolts on the outside of the bouyant body were frequently broken off or failed to withstand the pressure of usage, resulting in holes where they had been secured and destroying the buoyancy of the float. As a matter of fact, Carley's first patent signally failed in obviating longitudinal displacement and was of very little, if any, practical or commercial value. It could not be relied upon, and reliability in cases of very great excitement and acute emergency was essential.

An analysis of the specifications and claims of this patent fails to show what we are here concerned with, viz, a draw-rope construction. Rope H served no such purpose. This rope, extending completely around the buoyant body, hung loosely in festoons, and to it were attached at intervals a multiplicity of smaller ropes, rendered buoyant by wooden

or cork floats as life lines. Carley, to attain the reversibility of the bottom of the float, relied exclusively upon loose encircling rings of *rope* or *metal*, secured to the sides of the buoyant body by eyebolts. He does not seem to have conceived the idea of employing ropes so adjusted and arranged as to furnish the necessary pressure to avoid longitudinal displacement and disruption of nice alignment. If so, he would not have specified rings of *rope* or *metal*. A lifesaving device subject to disarrangement and fraught with danger of lack of utility is manifestly without commercial value, even though under exceptional circumstances and in places other than a wreck at sea it may be made to work in a single instance. The Government, through the proper officers of the Navy, found this type of Carley lifeboats inoperative after experimentation with sixteen of the same, and they were not used. The "chain and ring" construction was a decided failure.

Letters Patent No. 734118, here involved, clearly disclose a wide and important departure from the elements of the device going into the construction of Carley's prior lifeboat. Figure 1 represents a perspective view of the patent in suit. We reproduce it, as well as Figure 2.

Claim 4 of this patent accurately depicts the inventor's "draw-rope construction." The buoyant body is encircled at intervals with what is designated as rope rings, formed of a single strand of rope, with eyes or loops at each end, identified in Figure 1 by the letter M, in Figure 2 by M^1 and M^2. The rope rings thus formed are secured to the buoyant body by passing one loop through the other, one loop having a metal ring n attached thereto through this metal ring, or through an extended portion of the looped ends is threaded the backbone rope O, thus preventing the separation of the rope rings; 90° around the buoyant body in both directions from rope O appear drawropes p and p^1, extending longitudinally of the same. Ropes p and p^1 cross the encircling ropes M and are bound thereto as shown at q. Ropes p and p^1 are drawn tightly, pulling the outer halves of the rope rings M compactly and rigidly against the outer surface of the buoyant body and leaving the inner halves M^3 sufficiently slack so that the rings r may move freely thereon.

By this method of draw-rope construction Carley accomplished the novel idea of encircling the buoyant body in such a way as to secure a tight, immovable, nonshifting ring of rope, sufficiently slack at the desired point to accommodate the reverse movement vital to free passage of the bottom of the float through the orifice of the buoyant body. Proper alignments were maintained, and the ropes employed were made to function both as to their tensile strength in bearing a load and giving needed pressure to maintain stability. The patent was a success. The Government used it, and to within a very few months of the expiration of the patent its validity had never been challenged by either the Government or anyone else.

In what respect does the device made for and used by the Government differ from the Carley patent in suit? This we think appears from defendant's exhibit reproduced herewith.

The difference in structure upon which the defendant relies as determinative is the absence of the draw ropes p and p^1 from the float made by the Athens Company for the Government, and in their place the zigzag or shoe-lace arrangement of the draw ropes. The defendant contends that the zigzag construction attains the result by a "lacing action," a crisscross pull similar to shoe laces, and the Carley patent depends upon a "draw-string action." The refinement is extremely technical. To sustain the defense emphasis is put upon the word "longitudinally" in Carley's claims "draw ropes extending longitudinally along the upper and lower sides of the buoyant body," the defense insisting that the zigzag draw ropes in the Athens model do not extend longitudinally but crisscross fashion. Plaintiff in reply pertinently observes that Carley's claims do not use the words "in an undeviating line longitudinally," and what is more Carley's device was made in the shops of the plaintiff by employing the zigzag draw-rope construction and marketed with the same disclosed long before the Athens Company did the same thing. It was in no sense unusual. Defendant does not dispute the identity of results. Beyond disputation is the fact that the Athens type of float reaches the same end by utiliz-

Opinion of the Court

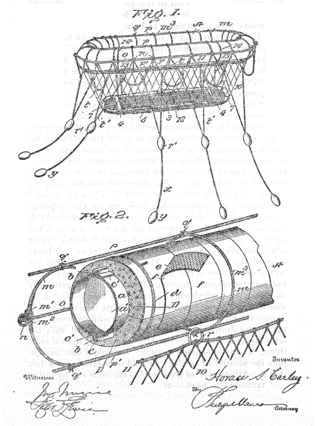
No. 734,118. PATENTED JULY 21, 1903.

H. S. CARLEY.

LIFE RAFT.

APPLICATION FILED MAY 14, 1903.

NO MODEL. 2 SHEETS—SHEET 1.



Opinion of the Court

ing the same elements in a slightly different way. Carley recognized the prime necessity for rope rings so constructed as to permit a degree of slack on the inside of the float and high pressure on the outside if he was to attain the desired reversibility of the bottom. This essential feature of the device was likewise important to the Athens corporation. It characterizes the invention; it is indispensable to efficient operation. May it then be said that by the adoption of a mere change in form wthout a substantal change in result, or functioning of the elements of a prior patent, a user may escape infringement? One skilled in the art could, without doubt, have obtained from a mere physical inspection of Carley's life float the idea embodied in the Athens float. Seemingly it required no originality to do what the Athens corporation did in constructing its float. At least no patent was applied for. In *Graham v. Mason*, 5 Fish. 11, affirmed by the Supreme Court in *Mason* v. *Graham*, 23 Wall. 273, the Supreme Court said:

"Infringement depends not so much upon the form of the particular device in question or upon the name given to it in the specification as upon the functions it performs, and it is well-settled law that if one device is employed in a similar combination as another and performs the same function in the same way, the two are substantially the same, although they may be different in form and may be known among mechanics by different names."

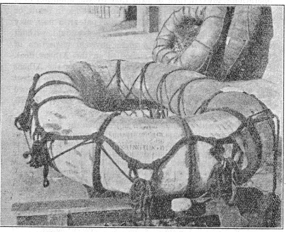
We can not escape the conclusion that what was done in the Athens factory was the equivalent of the Carley patent. The case of *Central Foundry Co.* v. *Coughlin*, 141 Fed. 91, 94, illustrates the fact. In this case the court said:

"An equivalent is defined as a thing which performs the same function, and performs that function in substantially the same manner, as the thing of which it is alleged to be an equivalent."

In our view of the case, to take away from Carley the fruits of an invention never heretofore challenged, although used by the Government and others, well known in the art, useful and valuable, upon the narrow and extremely technical contentions interposed herein would be extending the patent laws beyond their legal scope.

Opinion of the Court

Defendant earnestly contends that Carley's top and bottom ropes were completely anticipated in the patent granted to Köpcke, No. 456621, July 28, 1921. Köpcke, it is true, was attempting the construction of a life preserver, but his ideas and Carley's ideas were decidedly distinct. Köpcke's invention embodied no idea of reversibility and in no way involved a roping system wherein draw ropes were to



Defendant's exhibit. Float made by the Athens Co. for the Government

function so as to attain rigidity at one point and requisite slack at another, furnishing the means for reversibility and collapsibility. Köpcke's netting to support passengers was made secure and was incapable of shifting, and was simply "securely fastened to the inner periphery of the ring, preferably by means of the rope d" for the single purpose of sustaining *taut* the netting relied upon as a bottom. Of course, when air was introduced into Köpcke's circular tubes the ropes became *taut*. Surely no claim may

be advanced that this was the invention of a rope construction as the term is used in this case. One might well have examined the Köpcke patent in all its details without receiving a single suggestion useful to the construction of the Carley patent.

It is quite unnecessary to discuss an argument predicated upon the inoperativeness of the device disclosed in Carley's patent. One fact effectually disposes of the contention. The Government during the war adopted the device, used it extensively, and engaged the Athens Company to make it in numbers. The defendant as to this particular issue vigorously asserts the workability of Carley's first patent in order to predicate a defense of anticipation in the prior art, Carley's first patent having become public, and seemingly uses the same state of facts to demonstrate the inoperativeness of the patent in suit. The record does not sustain a contention that the patent in suit was inoperative. On the contrary, the longitudinal crisscross arrangement of the draw ropes is in exact accord with prior construction by the plaintiff in its shops, a fact which was publicly known and which is not proven to have been the single essential element of the patent vital to its operativeness. The defendant was fully acquainted with the patent in suit, knew its detail of construction, and was familiar with the types made and sold by the plaintiff. The record fully sustains the findings of the court in this respect.

The plaintiff is entitled to a judgment. The case will be remanded to the general docket as per stipulation of the parties for proof as to damages. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

JOHN C. JONES, JR., TRUSTEE IN BANKRUPTCY OF THE METZ CO., v. THE UNITED STATES

[No. E-291. Decided May 16, 1927]

Settlement contract; transfer of surplus material to contractor; taking of same by Government under claim of right.—In a settlement contract with the Government a clause is included, by mistake on the part of the contracting officer, providing that the material left over should "remain the property of the contractor." Under the terms of the prime contract the material was to become the property of the Government upon payment therefor, and upon execution of the said settlement contract the Government paid for the material. Thereafter the Government, claiming ownership and in the belief that it was its property, removed the material from the contractor's possession without objection. *Held*, that the taking raised no implication of a promise under which the contractor might recover.

The Reporter's statement of the case:

Mr. John C. Jones, jr., for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, John C. Jones, jr., a United States citizen, of Newton, Mass., is the duly appointed and qualified trustee in bankruptcy, case No. 30632, District Court of the United States for the District of Massachusetts, for the Metz Company, a Massachusetts corporation duly organized by law and having a usual place of business in Waltham, in said State.

II. The Metz Company was organized under the laws of Massachusetts on August 3, 1909, and from that date to February 1, 1918, it was actively engaged in the manufacture of automobiles in the said city of Waltham. The company occupied three plants, covering an area of 10 acres. It had machinery and equipment inventoried at $161,605.20, and was duly equipped for the business in which it was engaged. It employed an average of 600 persons, and made automobiles which had proved their worth.

III. The Metz Company entered into negotiations with the Government in October, 1917, relative to the construction of airplane parts. Beginning the first week of January, 1918, Government accountants and representatives were at the plant. Negotiations continued and the facilities of the plant were improved. On March 15, 1918, the United States, represented by A. C. Downey, Signal Corps, United States Army, entered into a cost-plus contract, known as Contract No. 3005, Order No. 20418, with the said Metz Company, represented by Charles H. Metz, to make spare parts for DeHaviland-4 airplanes. A copy of this contract is attached to the petition as "Exhibit A" and is made a part hereof by reference.

IV. The Metz Company began work on airplane parts in January, 1918, under the authorization and direction of the Government representatives, accountants, and production engineers, and continued its active operation until December 28, 1918.

V. Contract No. 3005 was supplemented on October 11, 1918, by Contract No. 3005-1, and on February 25, 1919, by Contract No. 3005-2. Under the terms of Contract No. 3005-2 the Metz Company was to receive a profit on the work already performed of 10 per cent instead of the 12½ per cent, which was originally agreed upon. Copies of the said contracts are attached to the petition as Exhibits B and C, respectively, and are made a part of this finding by reference thereto.

VI. On June 18, 1919, a contract was duly executed by the Metz Company by its assistant treasurer, A. J. Loring, and by the defendant by its contracting officer, Capt. S. M. Wiley, A. S. A. P., numbered 3005-A, terminating the aforesaid contracts 3005, 3005-1, and 3005-2. A copy of said contract 3005-A is attached to the petition as "Exhibit D" and is made a part hereof by reference thereto.

VII. At the time the aforesaid settlement of contracts 3005, 3005-1, and 3005-2 was under consideration, there were a number of vouchers yet unpaid covering costs under these contracts approved by the proper officers in Boston. The company contended that certain other items of cost should

also be paid. The company was also claiming that it should be reimbursed for the interest which it had paid on the loan or advance made by the Government. Mr. Loring was sent to Washington to effect a settlement of the contract. While in Washington he secured payment on the approved vouchers and received approval and payment of additional vouchers not previously approved. He also secured favorable consideration of the claim for reimbursement of interest and that claim was excepted from the general release in the terminating contract and was subsequently allowed and paid as a separate settlement under the authority given the Secretary of War by the Dent Act.

VIII. In anticipation of securing the aforesaid contract of March 15, 1918, the Metz Company maintained a force of 160 idle men in January and February, 1918, who got into production work, a few at a time, as the Government furnished blue prints and working data. The Government officials refused to honor vouchers for approximately $45,000 for the wages of these men during the period of their inactivity. Mr. Loring discussed a claim for this item with the aforesaid Lieutenant Miller at Washington in June, 1919, presenting to him a carefully prepared detailed schedule showing this unapportioned nonproductive labor. The said contract provided for inclusion in the cost of production of "the cost of all direct labor definitely ascertainable as having been used in the production of the spare parts herein contracted for."

IX. During the work under Contract No. 3005, at the demand and at the insistence of Government agents, the company purchased two high-speed special molding machines, one special high-speed wood-boring machine, four special humidity dry kilns with electric fans, one big rotary saw, one dope shed and boiler, and a shed for drying wings, large shipping platform, extension of the building, lumber conveyor, etc., at an alleged cost of $80,813.14. This machinery and equipment were useless to and not needed by the Metz Company in its business of manufacturing automobiles. The Metz Company attempted several times unsuccessfully to have this expense paid prior to the terminating contract.

For the aforesaid increased facilities the Metz Company was allowed an amortization of $34,814.85. (Exhibit D to the petition.) The difference between the said cost and the said amortization was a claim discussed by Mr. Loring in June, 1919, with Lieutenant Miller at Washington.

X. In June, 1919, Mr. Loring discussed with Lieutenant Miller, in Washington, a claim for profit, estimated at $6,000, on loss of production due to changes by the Government in its specifications, which took men away from direct production work and necessitated their working on special tools. Payment thereof was refused.

XI. Contract No. 3005, as an inducement to economy in the production of spare parts, provided for a schedule of the estimated cost and a 25 per cent bonus for savings effected in actual cost below this estimated cost. No such schedule was fully prepared and the Metz Company was never paid a bonus of 25 per cent under the terms of Contract No. 3005. The Metz Company unsuccessfully attempted to secure consideration of a claim for the said bonus and it was discussed by Mr. Loring with Lieutenant Miller in Washington in June, 1919. It was agreed between them that it was impossible to arrive at the correct amount. The said provision for a bonus for savings was eliminated February 25, 1919, by Contract No. 3005–2.

XII. In June, 1919, Mr. Loring also discussed with Lieutenant Miller in Washington a claim for $36,999.64, representing an alleged difference between a profit of 12½ per cent on estimated cost, as provided in Contract No. 3005, and a profit of 10 per cent on actual cost, as provided in Contract No. 3005–2. The basis for such a claim and the grounds for its assertion do not appear. Payment thereof was refused.

XIII. The manufacture of parts under Contract No. 3005 ceased December 28, 1918. Thereafter the only work done was boxing and shipping the manufactured parts, which was completed in March or April, 1919. From February, 1919, to June 17, 1919, the Government continued to occupy 62 per cent, or 149,600 square feet, of the factory, and for this space and for this period the Government paid the Metz Company rental at the rate of 5 per cent depreciation of

the building. The Government did not need this space and the parts could have been moved into a corner, or into approximately 8,000 square feet. The Metz Company during this period continually asked the Government officials in charge of the storage to move the material into a corner so that the company could use that space to manufacture or assemble automobiles. This lack of space decreased the facilities for the manufacture of automobiles. In June, 1919, Mr. Loring presented to the said Lieutenant Miller a claim for increased compensation, the amount whereof does not appear, for the use of this space.

XIV. Upon the execution of the terminating contract dated June 18, 1919, the Government paid the Metz Company for the cost of the raw material and other property mentioned in Article V thereof the sum of $313,533.03 inventory price and $31,353.30 profit thereon.

Thereafter the Government took possession of and removed part of this raw material and other property belonging to it which was stored in and upon the premises of the Metz Company. Before and at the time of said removal there was no protest upon the part of anyone against the removal, nor did anyone question the ownership of the Government in the material removed. The Government claimed that the property so removed was only part of the property which had been scheduled or inventoried in the report mentioned in Article V of said terminating contract, and which it had purchased and paid for, and during the negotiations to adjust the alleged shortage no question was raised as to whether the material listed in said schedule or inventory belonged to the Government. Removal of the material from the company's premises was completed on or about November 6, 1919.

Following its removal the company presented to the War Department claims aggregating $4,152.73 for the storage of the said material in or upon its premises from June 25, 1919, to the date of removal at a price agreed upon between representatives of the Government and of the company. The said claims were stated by the company as storage charges on material "becoming Government property upon settlement

of claim contract 3005," and were disallowed by the Auditor for the War Department June 11, 1921.

XV. After the terminating contract of June 18, 1919, had been executed, and before the Government had completed the aforesaid removals from the company's premises, the Government, upon request of the company, returned to it two truck loads of certain small tools and some tote boxes.

XVI. It was understood by the contracting officer, Capt. S. M. Wiley, A. S. A. P., at the time he signed the terminating contract of June 18, 1919, that under the terms thereof surplus material was retained by the Government. He did not know that the said contract provided that raw material and other property should "remain the property of the contractor" and would not have signed the contract if he had known the contract so provided. Such contracts usually provided that upon payment therefor by the Government unused or surplus material should become the property of the United States.

XVII. The said Lieut. W. Leslie Miller had no authority to enter into a contract for or in behalf of the United States. He was merely authorized to negotiate respecting proposed contracts. In June, 1919, and at the time negotiations were in progress as to the terms of the terminating contract of June 18, 1919, payment of the several claims mentioned in Findings VIII, IX, X, XI, and XII, *supra*, had been refused, and the said Miller knew that payment had been refused. He had before him the report of the accounting officer, upon which the said terminating contract was based, and knew its contents.

No mention was made by the said Miller of any settlement of the said claims, upon which payment had been so refused, to the contracting officer, Capt. S. M. Wiley, or to anyone else, at the time of the execution of the terminating contract, and the said claims are not mentioned or alluded to therein. The disposition, or settlement as to the transfer, of the property mentioned in Article V thereof was not discussed by the said Miller or Loring with anyone except between themselves.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff as trustee in bankruptcy of the Metz Company seeks to recover the value of certain property which he claims was, prior to the bankruptcy of the company and while owned by it, illegally removed from its possession and appropriated by the defendant to its own use.

The Metz Company had a cost-plus contract with the defendant by which it was to purchase and manufacture certain material and be reimbursed by the defendant for the cost involved plus a profit of 10 per cent on the amount of the cost. This contract provided that the material purchased by the plaintiff and paid for by the defendant should become the property of the latter. The property here in dispute had been purchased under the original contract by the Metz Company, and at the time of the execution of the terminating contract hereinafter mentioned was in its possession and so continued for a short time thereafter.

The defendant had a right under the contract to terminate it at any time, and under a notice from it shortly after the armistice production ceased except the work of completing unfinished articles. Negotiations extended over some months involving the investigation of certain claims of the Metz Company, among which were claims for idle labor prior to the execution of the original contract, expenditures for increased facilities, loss of profits due to change in specifications, and the difference between a profit of 12½ per cent on estimated cost and 10 per cent on actual cost, all of which prior to the execution of the terminating contract the defendant had rejected and refused to allow and pay. The court has found that none of the latter claims has been proved.

The negotiations ended in a terminating contract dated June 18, 1919, which was signed by the representative of the Metz Company and by Captain Wiley, a contracting officer for defendant. It was based primarily upon the report of an accounting officer, Air Service, which recommended the payment of $1,926,078.70 as the total amount due the Metz Company and included payment for the material on hand which had been purchased and was in possession of the said company, amounting to $313,533.03, the inventory price, and $31,353.30 profit thereon.

An examination of the contract will show that it covered vouchers numbered 1 to 333–B, inclusive, and the court has found that the aforesaid disputed claims were not included in these vouchers; no vouchers were ever issued for them, nor were they mentioned in the negotiations by Miller, the negotiating officer of the defendant, to any of his superiors, including Captain Wiley, who executed the contract. They were only discussed with Loring, the superintendent of the Metz Company. They are not mentioned in the contract.

The contract recited "that the amount represented by said vouchers [i. e., 333–B] is the entire amount that has become due or can become due from the Government to the contractor under the original contract except such amounts as are hereinafter specifically provided for." It recited also an indebtedness to the Torrington Company for $13,000 and agreed to indemnify the contractor against the claim. It then stated that the payment of the sum named, with the assumption of the Torrington claim, "shall constitute full and final compensation for all articles of work delivered, services rendered, and expenditures incurred by the contractor under the original contract, except as herein otherwise expressly provided." By Article IV of the contract the contractor agreed to assign, "remise, release, and forever discharge the Government of and from all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands whatsoever due or to become due in law or equity under or by reason of, or arising out of, said original contract," except a claim for $9,689.04, interest payments, which the contractor was given the right to prosecute.

The Government therefore settled with the Metz Company on the basis of the 333–B vouchers; the sum fixed was in payment thereof, and these vouchers, with the Torrington claim, covered full and final compensation for all work done under the contract and all expenditures made. The contractor by signing the contract gave a complete acquittance to the Government, reserving only the right to prosecute the claim for interest, which was afterwards paid by defendant. This claim for interest was, therefore, the only claim which, under the express terms of the contract, the contractor

could assert against the Government. The sum paid by the Government covered specifically the 333–B claim; the acquittance covered all claims. As stated, in the sum paid by the Government was included $313,533.03, inventory price of the material on hand, and $31,353.30 for profits on the same, which material plaintiff claims the defendant afterwards removed from the premises of the Metz Company, and for the value of which this suit is brought. The contract contained the following provision: "All of the raw material and other property scheduled in said report shall remain the property of the contractor." According to this provision the raw material on hand and other property were to remain the property of the contractor despite the fact that in receiving the sum paid by the defendant as full consideration under the contract it was being paid for this same material. In other words, while the defendant paid for the material with one hand, without any reason or consideration appearing on the face of the contract, with the other hand it gave back the same material to the contractor.

The contracting officer who signed the contract stated that he did so in the belief that it contained a clause providing that the material on hand should become the property of the Government, as it was customary to insert such a provision in all settlements of cost-plus contracts. No mention was made by the said Miller of any settlement of the said claims, upon which payment had been so refused, to the contracting officer, Capt. S. M. Wiley, or to anyone else, at the time of the execution of the terminating contract, and the said claims are not mentioned or alluded to therein. The disposition, or settlement, as to the transfer of the property mentioned in Article V thereof was not discussed by the said Miller or Loring with anyone except between themselves.

It is plain that the contracting officer did not examine or probably even read the contract before executing it, and the same may be said of the adjustment board which approved it. It is also clear that had this officer properly discharged his duty and examined the contract this clause would not have been in it when it was executed and this suit would

Opinion of the Court

probably not be here. He states that he would not have signed the contract had he known that it contained this clause. The transfer of the property to the Metz Company by the said clause and its insertion in the contract were mistakes. The view is borne out by the circumstances which occurred after the execution of the contract. The Government took possession of and removed the material without protest from the Metz Company, and the latter thereafter presented a bill for storage charges for the material during the period from the execution of the contract to the date of removal. The Government also asserted claims against the Metz Company for shortage in the material, and at no time did the Metz Company assert title to the material under the aforesaid provision of the contract. After the company became insolvent, its trustee in bankruptcy for the first time asserted the claim upon which this suit is brought. Just when it was first asserted by the trustee does not appear, nor is it shown just when the Metz Company became bankrupt. It was apparently more than a year after the execution of the contract. The fact is, however, that the Metz Company and those conversant with the matters in dispute here never claimed title to the material removed, and even the lawyer who attempted to collect the claim for storage stated in a letter to the Government that the word "contractor" in the provision quoted was clearly a mistake and should have been "Government."

In view of the conclusion herein stated, that we have no jurisdiction, it becomes unnecessary to discuss and decide the question of the reformation of the settlement contract, though we would have no difficulty from the findings in reaching the conclusion that it could be reformed.

At the time of the removal of the property the defendant claimed title to and ownership of it, and, in the belief that it was its property, removed it from the possession of the Metz Company without objection by the latter. Under these circumstances, of course, there was no express contract obligating the defendant to pay for the property. The plaintiff's claim, therefore, is based upon an implied contract on the assumption that the Metz Company was the owner of the property at the time of the removal thereof.

Syllabus

Inasmuch as the defendant took possession of and removed the property, claiming ownership thereof, no implication of a promise to pay arose. The very circumstance of the taking and removal of the property negatives an implication of a contract to pay. *Tempel* v. *United States*, 248 U. S. 121, 129; *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S. 46, 57; *John Horstmann Co.* v. *United States*, 257 U. S. 138, 146; and *Klebe* v. *United States*, 263 U. S. 188, 191. It is also to be observed that if this was not a taking it was a conversion and a tort for which the Government was clearly not liable. This disposes of the plaintiff's right to recover in this court.

We are of opinion that plaintiff's petition should be dismissed, and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

REMINGTON ARMS UNION METALLIC CARTRIDGE COMPANY v. THE UNITED STATES

[No. B-102. Decided June 6, 1927]

On the Proofs

Contract; cost-plus; benefit of prior contract between contractor and third party.—In a contract between the plaintiff and the Government for the manufacture of ball cartridges at cost plus profit it was provided: "The contractor will, from time to time, * * *, purchase or contract for the purchase of all materials * * * and upon such terms as appear to the contractor to be reasonable," and "shall use every endeavor to obtain materials * * * under this contract at the lowest possible prices, and shall in no case pay higher prices than required by existing market conditions, nor higher prices than are or could be paid for similar materials, purchased at the same time and under like circumstances and conditions for other work in progress in the plant." At the time the Government contract was entered into the plaintiff was receiving, for use in the manufacture of cartridges, a limited amount of sheet metal converted by another company, under an earlier contract therewith, from virgin metals furnished by the plaintiff and at lower

Reporter's Statement of the Case

prices than could be obtained by purchase made at the time the Government contract was entered into. Under its contract the Government for such conversion furnished its own copper, zinc, and nickel to the same company, payment to be made to the plaintiff as part of the cost of the work. *Held,* that the Government, since it contracted with reference to future purchases of supplies, was not entitled to the benefit of the lower prices.

The Reporter's statement of the case:

Mr. William Wallace, jr., for the plaintiff. *Chadbourne, Stanchfield & Levy* were on the brief.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Remington Arms Union Metallic Cartridge Company (Inc.), is and was during the different transactions hereinafter set out in these findings of fact a corporation duly incorporated and organized in the year 1916 under the laws of the State of Connecticut, having its principal place of business at No. 25 Broadway, in the city and State of New York, and its main plant at Bridgeport, Connecticut, and was a consolidation of the properties and business of the Union Metallic Cartridge Company and the Remington Arms and Ammunition Company, and is the owner of the claim which is the subject matter of this suit.

II. On July 20, 1917, the plaintiff entered into a written cost-plus contract with the United States to manufacture 470,000,000 ball cartridges. This contract was described as No. 14065. The contract recited that a national emergency existed, and that the President "hereby places with the Remington Arms Union Metallic Cartridge Company, as an order under the provision of section 120 of the national defense act of June 3, 1916, the requirement that it comply with the contract hereinafter set forth, to manufacture 470,000,000 ball cartridges, model of 1906, caliber .30, complete in all respects, in accordance with drawings and specifications hereto attached." Article VII stipulated that "The contractor will make the necessary outlays in advance,

and manufacture and supply in conformity with the aforesaid drawings and specifications, including duly authorized changes therein, 470,000,000 cartridges and will supply said cartridges packed for shipment at the contractor's works." Article XI (d), subparagraph (3), stipulated that "The contractor will, from time to time, except as otherwise provided, purchase or contract for the purchase of all materials, tools, equipment, or other personal property of whatsoever nature required for the manufacture of said cartridges, and upon such terms as appear to the contractor to be reasonable." Article XI (a) fixed a "normal cost" of $50 per 1,000 cartridges, based upon the price per pound of copper, zinc, lead, and powder, which was subject to change with the variation in prices of those elements. Paragraph (b) provided for a profit of 10 per cent on the cost of the manufacture of the cartridges. Paragraph (c) provided for a deduction of 20 per cent from plaintiff's profits on any excess cost above the "normal cost," and for a bonus of 20 per cent to plaintiff for any reduction of "normal cost" by actual cost. Article XI (3) stipulated "A reasonable rate of interest not exceeding 6% per annum on a proper proportion of the investment in plant, facilities, inventory, and working capital, not owned or provided by the Government." Article XII provided that "The contractor shall use every endeavor to obtain materials, equipment, appurtenances, supplies, etc., under this contract at the lowest possible prices and shall in no case pay higher prices than required by existing market conditions, nor higher prices than are or would be paid for similar materials purchased at the same time and under like circumstances and conditions, for other work in progress in the plant." There were five supplemental contracts executed by which the number of cartridges to be manufactured was increased to 1,365,000,000. Deliveries were to begin in October, 1917, and to be completed in January, 1919. The said Contract No. 14065 and supplements thereto are attached to plaintiff's petition as Exhibits A1–A6, and are made part of this finding by reference thereto.

III. The plaintiff and its predecessors for more than 100 years were engaged in the manufacture and sale of firearms, and after the invention of metallic cartridges in 1865 they

were also engaged in the manufacture and sale of cartridges. The principal materials entering into the manufacture of cartridges are (*a*) brass and gilding metal for shells, primers, etc.; (*b*) cupro-nickel for bullet jackets; (*c*) lead for bullet cores; (*d*) powder and fulminate mixtures. Brass and gilding metal are manufactured from copper and zinc (spelter), and the process is called "conversion" and consists in melting and mixing and casting the mixture into slabs and rolling into sheets of required thickness for cartridge manufacture. Cupro-nickel is obtained from mixing nickel and copper and is converted by a similar process to that used for brass and gilding metal. Brass mills make brass from their own metals and sell in the open market, or they render a conversion service by manufacturing brass from metals furnished by others. The use of brass and cupro-nickel in cartridge factories results in the production of a considerable amount of "scrap metal" which goes back to the brass mill and is "reconverted" into brass, gilding metal, or cupro-nickel. High grades of copper, zinc, and nickel are necessary for cartridges, and to insure a proper quality manufacturers furnish their own virgin metals to the brass mills for conversion and pay the conversion service.

IV. In 1914 and for many years prior thereto the plaintiff and its predecessors had a regular and well-established business. It sold from stock and also manufactured to maintain its trade. It also sold under contract. All of its business prior to 1917 was on a fixed-price basis. Cost-plus contracts prior to 1917 were unknown in the cartridge business. In 1914 plaintiff was operating a plant at Bridgeport, Connecticut, which as then built and equipped was capable of manufacturing all the cartridges it was then selling in its regular business. Any considerable increase in production would have required new plants or the extension of existing factories and facilities. The plaintiff, some time afterwards, in order to take care of its greatly increased trade, including its Government contracts, made extensive increases in its facilities at the Bridgeport plant and secured two additional plants, one at Swanton, Vermont, and the other at Hoboken, New Jersey.

Prior to 1914 plaintiff and its predecessors had never used more than 9,200,000 pounds of brass and gilding metal, nor more than 76,000 pounds of cupro-nickel in any single year. While plaintiff was not tied to any particular mill for its conversion service the American Brass Company or its predecessor had for 30 years furnished a considerable part of such service on copper, zinc, nickel, and "scrap" owned by plaintiff. As the cost of manufacture was largely influenced by the cost of conversion of its metals, and realizing that a continuance of the European war might affect conversion charges, the plaintiff soon after August 1, 1914, took up the matter of arranging with the American Brass Company to supply its entire conversion service. On September 30, 1914, the plaintiff and the American Brass Company entered into an agreement by which for five years beginning October 1, 1914, the plaintiff agreed to take its "entire requirements" from the said brass company and the brass company agreed to reduce its charges for conversion of plaintiff's metals into brass and gilding metal from 3 cents to 2½ cents per pound and into cupro-nickel to 11⅜ cents per pound, and for reconversion of plaintiff's "scrap" to 1¼ cents per pound.

V. The plaintiff and the American Brass Company by letters of July 26 and July 31, 1916, agreed that the contract of September 30, 1914, should be so construed as to limit for the years 1915 and 1916 the conversion service of the American Brass Company to 17,100,000 pounds of brass and gilding metal and 900,000 pounds of cupro-nickel and that for conversion service for brass and gilding metal above 17,100,000 pounds and under 50,000,000, plaintiff should pay 3 cents per pound, and for conversion service on cupro-nickel above 900,000 pounds 14 cents per pound. That agreement was carried out during the years 1915 and 1916.

VI. During the year 1916 the American Brass Company produced over 47,000,000 pounds of brass and gilding metal and nearly 3,000,000 pounds of cupro-nickel conversion service for plaintiff. On September 25, 1916, the brass company notified plaintiff that owing to increased labor, material, and machinery cost it would not renew the 3 cents per

pound conversion charge for the year 1917, and would charge 8 cents per pound for all brass and gilding metal service during that year in excess of 17,100,000 up to 50,000,000 pounds. It was thereupon agreed between them in April, 1917, that after the 17,100,000 pounds above referred to should be used up the prices for 1917 should be fixed in accordance with prevailing conditions. This arrangement resulted in an agreement between plaintiff and the brass company fixing 6 cents per pound for all brass and gilding metal conversion during 1917 in excess of 17,100,000 pounds. Six cents per pound was the lowest market price for brass and gilding metal conversion during the years 1917 and 1918, and 14 cents per pound for cupro-nickel conversion.

VII. The plaintiff reached its low-price limit of 17,100,000 pounds of brass and gilding metal conversion and reconversion on April 5, 1917, and its low-price limit of 900,000 pounds of cupro-nickel conversion and reconversion on May 7, 1917, after which it paid 6 cents per pound for brass and gilding metal and 14 cents per pound for cupro-nickel conversion for every excess pound taken by it in its commercial and fixed-price contract trade.

VIII. Shortly after receiving the notice in September, 1916, from the American Brass Company concerning its contract of September 30, 1914, referred to in Finding VI, the plaintiff made a contract with the Stamford Rolling Mills for brass and gilding metal conversion service on 7,000,000 pounds not to exceed 10,000,000 pounds of plaintiff's metal at 10 cents per pound. The plaintiff took the full 7,000,000 pounds; 4,369,161 were used in 1917 and the balance in 1918, and 10 cents a pound was paid therefor. On March 28, 1918, the plaintiff procured 1,028,788 pounds of brass and gilding metal conversion for 7 cents per pound.

IX. The plaintiff furnished all of the copper, zinc, and nickel to the brass company for conversion into brass, gilding metal, and cupro-nickel for use in its commercial business and its fixed-price cartridge contracts, several of which for large amounts were made with foreign countries before its cost-plus contract with the Government. The Government under its cost-plus contract elected to furnish its own copper,

zinc, and nickel to the brass company for conversion through plaintiff. At different times during the years 1917 and 1918 the Government ran short and borrowed virgin metals from plaintiff, which were returned in kind after periods from a few days to eight months. On one occasion, when Government brass was coming into plaintiff's plant slowly, plaintiff, with the approval of Government officers, used 1,000,000 pounds of brass which had been made by the Stamford Mills for plaintiff at a conversion charge of 10 cents per pound. Later the Government returned the same quantity of brass which had been made from its own metals by the brass mill for 6 cents per pound, and the Government refused to pay plaintiff the 4 cents a pound difference.

X. The plaintiff in the performance of Contract No. 14065, from its date, July 20, 1917, to January 1, 1918, the end of the calendar year 1917, paid the same conversion and reconversion rates for its Government work as it paid for its commercial and fixed-price contract business, and it was reimbursed by the Government at the same rates. Due to the immense increase in the use of brass, gilding metal, and cupro-nickel by plaintiff in its regular trade, foreign fixed-price contracts and the Government cost-plus contract, at the end of the year 1917 the American Brass Company insisted that plaintiff during the year 1918 should limit its claim upon the brass company for conversion service at the contract price to its own actual requirements as contemplated by the parties on September 30, 1914, that is, not to exceed 17,100,000 pounds of brass and gilding metal, and not to exceed 900,000 pounds of cupro-nickel conversion service. The plaintiff assented to this demand.

XI. In the performance of said Contract No. 14065 from January 1, 1918, to March 26, 1918, plaintiff charged to and was paid by defendant for 14,703,168 pounds of brass conversion at 6 cents per pound; for 109,397 pounds of anvil-brass conversion at 6½ cents per pound; for 354,601 pounds of gilding-metal conversion at 9 cents per pound; for 867,341 pounds of cupro-nickel conversion at 14 cents per pound; for 9,321,007 pounds of brass-scrap reconversion at 2¼ cents per pound. The plaintiff during the same period was paying

for similar conversion and reconversion service in its commercial and fixed-price contract business 2½¢, 3¢, 5½¢, 11⅜¢, and 1¼¢, respectively. The above conversion and reconversion services were ordered at the American Brass Company's mill with the approval of the prices charged by the proper Government officials, and the plaintiff was reimbursed for its payments after approval of its bills by the proper Government officials. The differences between the conversion and reconversion charges paid by the Government during the above period, and the same conversion and reconversion services rendered during the same period, paid for at the rates paid by plaintiff in its commercial and fixed-price contract business contracted for before it entered into its cost-plus contract with the Government, would have aggregated $646,828.59. This amount was composed of $530,-850.82 relating to brass and gilding-metal conversion, $93,210.07 relating to brass and gilding-scrap reconversion, and $22,767.70 relating to cupro-nickel conversion.

It does not appear from the evidence whether or not any changes were made in the charges and payments for conversion and reconversion after March 26, 1918.

XII. The differences of $646,828.59 described in Finding XI were deducted in two amounts, $400,000 on January 31, 1919, and $246,828.59 on July 16, 1919, from two amounts, $2,271,165.63 and $560,313.32, respectively, both due and payable as profits on other work under Contract No. 14065 and supplements. There was also deducted 1% of said $646,-828.59, amounting to $6,468.28, as cash discount of bills of the American Brass Company in payment of said amounts. This was an error and was corrected in the general settlement of February 14, 1922, later described in these findings. On April 2, 1919, plaintiff submitted to the accountant in charge a request for repayment of said $400,000 and on July 30, 1919, a request for repayment of said $246,828.59, both of which were refused by the accountant in charge, the first on April 8, 1919, and the second on September 5, 1919.

XIII. At the request of the Secretary of War the Comptroller of the Treasury rendered an opinion in which he held that the $400,000 had been properly deducted on January

31, 1919, and should not be repaid to plaintiff. 25 Comp. Dec. 941. The plaintiff afterwards requested a resubmission of the claim to the Comptroller by the Secretary, which he declined to do.

XIV. The defendant, upon the ground that the deduction of $646,828.59 from plaintiff's profits entitled the plaintiff to a bonus of 20 per cent of that amount under Article XI (c) of Contract No. 14065, as a saving between the estimated "normal cost" and the actual cost, on November 26, 1920, paid plaintiff the sum of $129,365.72. The plaintiff thereafter requested the Auditor for the War Department to settle its claim for the deduction, and on May 7, 1921, the auditor made a settlement in plaintiff's favor in the sum of $517,462.87. This was the difference between the deduction of $646,828.59 and the bonus of $129,365.72 paid the plaintiff on November 26, 1920. In the meantime the office of the Comptroller of the Treasury was abolished, and he was succeeded in duties by the Comptroller General on July 1, 1921, 42 Stat. 23. On review of the above settlement, the Comptroller General reversed the auditor's decision and held that the entire amount, $646,828.59, had been properly deducted, and charged the bonus of $129,365.72 against the account of the disbursing officer. On April 8, 1922, the Comptroller General denied plaintiff's petition for a rehearing.

XV. After the execution of the contract of July 20, 1917, known as Contract No. 14065, and during its performance, plaintiff and the United States entered into a number of other contracts for cartridges, rifles, machine guns, and other war materials and equipment, some of which were formal contracts executed in compliance with section 3744 of the Revised Statutes and some were informal contracts described as Dent Act contracts, 40 Stat. 1272. The greater part of these agreements were fixed-price contracts for the manufacture and delivery of completed articles. On February 14, 1922, claims against the Government in such of these contracts, including Contract No. 14065, as had not been completed or terminated, were included in a general settlement agreement between the plaintiff and the United

States. In this settlement agreement the United States agreed to pay and the plaintiff agreed to accept $650,000 in final payment for the articles, work, services, and facilities heretofore delivered and accepted and in full and final adjustment and discharge of all claims and accounts of every nature, whether made under formal or informal contracts between the plaintiff and the United States entered into between April 5, 1917, and November 12, 1918, except unpaid claims of third persons against the contractor arising from or connected with the performance of any cost-plus contract or any lawful claim or demand by an employee or laborer employed by the contractor in the performance of any formal or informal agreements for unclaimed wages growing out of any award by the War Labor Board. The "Brass Conversion Claim" growing out of the deduction of $646,828.59 then before the Comptroller for $517,462.87 (the plaintiff at that time still retained the bonus of $129,365.72), was specifically excepted from general settlement.

It was agreed between the plaintiff and the Government that when the sum of $646,828.59 was deducted from moneys due the plaintiff by the Government the Government did not deduct the profits thereon which had been theretofore paid to plaintiff by the Government, and it was further agreed that after crediting plaintiff with $6,468.28 erroneously deducted from plaintiff as described in Finding XI the amount deducted should have been according to the contention of the Government $707,959.07 instead of $646,828.59, a difference of $61,130.48. It was further agreed that "this settlement did not discharge or release, or in any way affect the claim of the contractor now pending before the Comptroller General, known as the 'Brass Conversion Claim,' or the defenses of the United States thereto." It was further agreed that the contractor should deposit said sum of $61,130.48, the profit paid by the United States to plaintiff as aforesaid, together with the sum of $11,461.96, the accrued interest thereon to February 14, 1922, amounting, principal and interest, to $72,592.44, in an interest-bearing escrow account. It was further agreed "that upon final decision by the Comptroller General, or courts of competent jurisdiction of the

'Brass Conversion Claim,' the contractor shall release to the United States such proportion of the amount then on hand in escrow as the proportion of the 'Brass Conversion Claim' disallowed bears to the entire 'Brass Conversion Claim,' and the United States agrees to release to the contractor such proportion of the amount so then on hand in the said escrow as the proportion of the 'Brass Conversion Claim' allowed bears to the entire 'Brass Conversion Claim.'" This sum of $72,592.44 was paid by plaintiff by check dated March 8, 1922, to Captain Edwin F. Barry, Ordnance Department, disbursing officer, and was deposited by him in the Third National Bank, Springfield, Mass., on March 9, 1922, where it remains. The rate of interest paid by the bank on such deposits is not shown by the evidence. The settlement award of $650,000 was paid to plaintiff by the same disbursing officer against whose account the Comptroller General charged the bonus of $129,365.72 as an erroneous payment to plaintiff on November 26, 1920. This officer made out a voucher in which he deducted the sum of $129,365.72 from the settlement award of $650,000, leaving a balance "for payment" of $520,634.28. The plaintiff signed the said voucher stating in conclusion "said payment is hereby accepted in full settlement, release, and discharge of all matters and things contained and represented, or intended so to be, in said award with reference to which said payment is made." The plaintiff was paid the sum of $520,634.28 by check on the Treasurer of the United States, dated March 21, 1922, and signed by Captain Edwin F. Barry.

XVI. The United States refunded to the plaintiff, with interest at the rate of six per centum per annum all of its investment in the plant, facilities, inventory and working capital not owned or provided by the Government as stipulated by Article XI, paragraph (d), subparagraph (3), including all of its investment in the sum of $646,828.59 before its deduction as described in Findings XI and XII.

The court decided that plaintiff was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

On July 20, 1917, plaintiff, the Remington Arms Union Metallic Cartridge Company, entered into a contract with

the Government by the terms of which it was agreed that plaintiff would manufacture for the use of the Government 470,000,000 ball cartridges in accordance with certain drawings and specifications, for which plaintiff was to be paid the actual cost of manufacture, including facilities, materials, and labor; and for its profit plaintiff was to be paid an amount equal to ten per cent on the actual cost. It was also provided by Article XI, paragraph (d), subparagraph (3), that the Government would pay " a reasonable rate of interest not exceeding six per cent (6%) per annum on a proper proportion of the investment in plant, facilities, inventory, and working capital, not owned or provided by the Government." Thereupon plaintiff entered upon the performance of the contract, purchasing its materials in the market and at the market price, and charging the Government the actual cost of same, together with interest at the rate of 6 per cent per annum on items of investment under the provisions of the contract just mentioned, plus ten per cent as profit, as provided in the contract, which charges were, from time to time, paid by the Government. A number of supplemental contracts were made merely providing for additional supplies of cartridges under the same terms and conditions as contained in the original contract.

In September, 1914, an agreement was entered into between plaintiff and the American Brass Company by which the brass company undertook to furnish, and the plaintiff agreed to accept, for a period of five years, plaintiff's entire requirement of a certain metals composition necessary in the manufacture of cartridges, generally referred to as conversion supplies, at the price of two and one-half cents per pound on brass and gilding-metal conversion, and eleven and three-eighths cents per pound on what is called cupro-nickel conversion, and one and three-fourths cents per pound for scrap reconversion. Thereafter the American Brass Company furnished plaintiff its conversion supply, as will be hereinafter fully explained.

Defendant states that in September, 1918, it received certain information concerning plaintiff's contract with the American Brass Company. In a conference thereafter, to

wit, on December 18, 1918, between representatives of plaintiff and representatives of the Government, plaintiff disclosed all agreements between plaintiff and the brass company covering conversion requirement of plaintiff for the period of performance of the cartridge contract. Thereafter a full audit was made by an auditor selected by defendant, with the permission and assistance of plaintiff, which resulted in a finding by the auditor of an alleged overcharge by plaintiff on account of conversion prices amounting to $646,828.59. In January, 1919, defendant withheld the sum of $400,000 from sums otherwise due plaintiff under the contract pending the investigation just mentioned. On July 16, 1919, defendant withheld from sums otherwise due plaintiff the further sum of $246,828.59, which together with the $400,000 theretofore withheld, constituted the aggregate sum of $646,828.59 found by the auditor to be an overcharge. This action is for the recovery of the sum so withheld, $646,828.59.

The theory upon which defendant assumed the right to withhold this sum from plaintiff is based upon the contention that the Government was entitled under its contract with plaintiff to the benefit of the price for conversion supplies obtaining under the brass contract of 1914. A proper determination of this issue requires a consideration of both contracts. For many years prior to 1914 plaintiff company had been procuring most of its conversion supplies from the American Brass Company. Plaintiff, however, had never in any single year prior to 1914 required for its use in the manufacture of cartridges more than 9,200,000 pounds of brass and gilding-metal conversion, nor more than 76,000 pounds of cupro-nickel conversion, and this was at that time approximately the capacity of plaintiff's cartridge-making plant. Both the capacity of the plant and plaintiff's requirement of conversion supplies were then and theretofore well known to the American Brass Company. Anticipating an increased demand for the products of its plant by reason of the European war, which began on August 1, 1914, plaintiff, exercising unusual business caution, sought by its ar-

rangement with the brass company to protect itself in the matter of supplies necessary in the production of cartridges and against probable increase in the price of such supplies. Plaintiff's requirement, by reason of the abnormal growth of its business, increased to such extent that the brass company objected to furnishing plaintiff's entire requirement, claiming that the large increase was beyond its obligation under the agreement of September, 1914. An adjustment was made in July, 1915, by which it was agreed that the words "entire requirement" should be held to entitle plaintiff to have 17,100,000 pounds of brass and gilding-metal conversion and 900,000 pounds of cupro-nickel conversion at the low price for the years 1915 and 1916; and it was further agreed that for any excess that might be needed by plaintiff the price during each of these two years should be three cents per pound for brass and gilding-metal conversion and fourteen cents per pound for cupro-nickel conversion until the total quantities claimed should equal 50,000,000 pounds. This arrangement was observed throughout the years 1915 and 1916. The brass company, however, refused to renew the three-cent excess conversion rate for the year 1917, and the parties agreed on a six-cent price on this item. It should be mentioned that plaintiff reached the low price limit of 17,100,000 pounds for the year 1917 by April of that year, and thereafter during the year it paid the price of six cents per pound for such excess for its use in its commercial business and its fixed-price contract uses. It likewise reached its low price limit of 900,000 pounds of cupro-nickel conversion by May, 1917, and thereafter paid during the remainder of the year fourteen cents per pound for the excess cupro-nickel conversion required and used by it in its commercial business and its fixed contract uses.

It also appears that, owing to a fear that its supply of service for its commercial uses might be imperiled, plaintiff contracted with another mill for not less than 7,000,000 nor more than 10,000,000 pounds of brass and gilding-metal conversion at ten cents per pound. Under this contract it took at that price 4,380,888 pounds in 1917, and the balance of the

Opinion of the Court

7,000,000 pounds in 1918. At the time, therefore, of the execution of the contract between plaintiff and the Government, July 20, 1917, plaintiff having already exhausted its low price limit for 1917, was then paying the brass company six cents per pound for such excess as it was procuring from said company, and was also paying ten cents per pound for 4,380,888 pounds secured in 1917 under the contract just above mentioned. In 1918 plaintiff was still receiving a less quantity of the low-price material than was sufficient to meet its commercial demands.

The whole question involved here is whether or not plaintiff under its contract with the Government was under obligation to devote to the Government contract the low-price material acquired under a previous contract, while at the same time it was required to purchase such material as was necessary for the performance of its fixed-price contracts, and for its commercial business at prices ranging from six to ten cents per pound. Without reference to the terms of the Government contract, which will presently be considered, we are of the opinion that it was under no such obligation. If all the material contracted for in 1914 had actually been on hand in plaintiff's plant on July 20, 1917, plaintiff could not have been compelled, in the absence of an express stipulation to that effect, to furnish same at the price provided in the 1914 contract, or at less than the prevailing market price. The same principle would apply to materials delivered from time to time under such contract. The construction of the contract contended for by the Government would amount to nothing more nor less than a confiscation by the Government to the extent of the difference between the low price obtaining under the brass company contract and the price paid by plaintiff from time to time for materials used in the Government contract, which appears to have been the fair market price.

It should be observed, however, that the respective rights of the parties are fixed by the plain terms of the contract itself. It is provided that "the contractor *will, from time to time*, except as otherwise provided, purchase or contract for

the purchase of all materials * * * and upon such terms as appear to the contractor to be reasonable." It is further provided that "the contractor *shall* use every endeavor to obtain materials * * * under this contract at the lowest possible prices, and *shall* in no case pay higher prices than required by *existing market conditions*, nor higher prices than are or would be paid for similar materials, *purchased at the same time* and *under like circumstances* and *conditions* for other work in progress in the plant."

This language plainly relates to future purchases of supplies for use in the performance of the contract. It is not susceptible of any other interpretation. Any construction of these terms which would permit the Government to claim the benefit of a purchase of materials three years prior to the date of the Government contract would be a perversion of the ordinary meaning of language.

Some confusion has arisen concerning an item of $129,-365.72 which was paid to plaintiff on November 29, 1920. The Government contends that if plaintiff should be allowed a recovery of the $646,828.59, this amount paid on November 29, 1920, must be deducted. The Government paid plaintiff the $129,365.72, which is 20 per cent of the $646,828.59 withheld by the Government under Article XI (c) of the contract, which provided for a bonus of 20 per cent as a saving between the estimated "normal cost" and the actual cost. Plaintiff, thereafter, requested the Auditor for the War Department to settle its claim concerning the deduction by the Government of the $646,828.59, and on May 7, 1921, the auditor made a finding in plaintiff's favor in the sum of $517,462.87, which was the difference between the amount withheld by the Government and the bonus of $129,365.72 which had already been paid to plaintiff. On review of the finding of the auditor the Comptroller General reversed the decision of that official and held that the entire amount, $646,828.59, had been properly deducted and withheld from plaintiff, and charged the bonus of $129,365.72 against the account of the disbursing officer. After the execution of the contract of July 20, 1917, plaintiff and the Government made

other contracts, and on February 14, 1922, a settlement agreement was entered into between plaintiff and the Government. The so-called " brass conversion claim " then pending before the Comptroller General for $517,462.87 (plaintiff at that time still retaining the bonus of $129,365.72) was specifically excepted from the general settlement. When the settlement award, which amounted to $650,000, was paid to plaintiff, the disbursing officer against whose account the Comptroller General had charged the $129,365.72 as an erroneous payment to plaintiff, deducted said sum from the $650,000 and plaintiff was paid the balance of $520,634.28. It is perfectly clear, therefore, that the $129,365.72 was taken from plaintiff by this deduction by the disbursing officer.

It should be noticed in connection with the bonus item that plaintiff itself is in error concerning same. In its brief it is stated " in a general settlement of all claims and contracts between Remington and the Government (save the claim here in suit), which settlement was had in February, 1922, and while Remington still held the above 20 per cent, the Government insisted that Remington should deposit in escrow (which Remington did) one-half of that 20 per cent, plus other small items, totaling about $70,000. Such deposit was to abide the event of this brass conversion controversy, and it still remains on deposit in escrow." Plaintiff wholly misconceives the facts in regard to the escrow deposit. It is plainly set forth in the settlement contract referred to in the following language: " It is further agreed that the contractor shall deposit in an interest-bearing escrow account the sum of sixty-one thousand one hundred thirty dollars forty-eight cents ($61,130.48), being the profit paid by the United States on the principal sum of the brass conversion claim, together with the sum of eleven thousand four hundred and sixty-one dollars ninety-six cents ($11,461.96), which is agreed to be the accrued interest thereon to the date of this contract.

" It is further agreed that upon final decision by the Comptroller General, or courts of competent jurisdiction of the 'brass conversion claim,' the contractor shall release to

the United States such proportion of the amount then on hand in the above escrow as the proportion of the 'brass conversion claim' disallowed bears to the entire 'brass conversion claim,' and the United States agrees to release to the contractor such proportion of the amount so then on hand in the said escrow as the proportion of the 'brass conversion claim' allowed bears to the entire 'brass conversion claim.'" The total sum, $72,592.44, was deposited on March 8, 1922, in an interest-bearing escrow account in the Third National Bank, Springfield, Massachusetts, where it now remains. (Finding XV.)

The petition in this case did not contain a prayer for interest. After submission and argument plaintiff presented for filing a motion for leave to amend the prayer of complaint so as to include a claim for interest. This motion is hereby granted, and the filing of an amended petition to that end and purpose is allowed. Plaintiff, however, is not entitled to interest as claimed. The service and materials furnished the Government by plaintiff were rendered and furnished under contract. The allowance of interest is therefore prohibited by section 177 of the Judicial Code, which provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." The only stipulation for the payment of interest under this contract is contained in Article XI, as mentioned above (Finding II), and all interest called for under that provision was charged against the Government and was paid by the Government (Finding XVI).

In the opinion of the court plaintiff is entitled to recover herein the sum of $646,828.59, and it is so adjudged.

HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

GRAHAM, *Judge*, took no part in the decision of this case.

MACK COPPER COMPANY v. THE UNITED STATES

[No. D-134. Decided June 6, 1927]

On the Proofs

Eminent domain; taking under expectation of lease; removal of soil; compensation.—Where the Government takes possession of land with the expectation of procuring a lease, and retains possession and uses the land without at any time obtaining the lease, it is liable to the owner for the value of the use and occupation, and where, during the occupancy, it removes and sells to third parties a part of the soil, it is also liable to the owner for just compensation for the soil removed, with interest to the date of payment.

Same; liability for waste.—Under the circumstances recited, and where there has been waste, no covenant can be implied under wh.ch relief can be given for the waste committed.

The Reporter's statement of the case:

Messrs. Horace S. Whitman and *John W. Clifton* for the plaintiff. *Mr. E. E. Hendee* was on the brief.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, the Mack Copper Company, is now, and was at the times hereinafter mentioned, a corporation duly organized under the laws of the State of Delaware, for the purpose, among other things, of holding, purchasing, mortgaging, and conveying real estate and personal property in the State of Delaware and elsewhere.

Under date of May 21, 1917, the Mack Copper Company complied with the laws of the State of California, providing for foreign corporations doing business in said State, and has been ever since duly authorized to transact business in the State of California, and is now transacting business in the State of California, with its principal office in the city of San Diego, county of San Diego, in said State.

II. On the 26th day of March, 1912, Joseph S. Mack, representing himself and others, entered into a written agree-

ment with the Sam Ferry Smith Company, a corporation having its principal place of business in the city of San Diego, county of San Diego, State of California, wherein it was agreed by and between said parties that the Sam Ferry Smith Company would sell and convey unto Joseph S. Mack the following-described real estate in the county of San Diego, State of California, bounded and described as follows, to wit—

"Lot seventy-eight (78), Rancho Mission of San Diego, according to partition map thereof made in the action of Juan M. Luco et al. *vs.* Commercial Bank of San Diego et al. and on file in the office of the county clerk of said county, containing five thousand and thirty-nine (5,039) acres, more or less."

for the sum of $300,000 gold coin of the United States, payable as follows: $10,000 at the time of the execution of the contract, $90,000 on or before July 26, 1912, and $200,000 on or before March 26, 1914, together with interest on all deferred payments at the rate of six per cent per annum from date of contract, payable quarterly; and that the Sam Ferry Smith Company was to accept the note of Joseph S. Mack for the sum of $200,000, payable on or before March 26, 1914, with interest thereon at the rate of six per cent per annum, payable quarterly, secured by first mortgage upon the premises described in said contract. This agreement to purchase was assigned to Caroline J. Mack in 1913.

III. Due to the fact that there was a cloud upon the title to said real estate, the Sam Ferry Smith Company was required to quiet title to the same before it could execute a deed of conveyance conveying to the said Joseph S. Mack a good merchantable title. This required time, and it was not until the 27th day of April, 1917, that the Sam Ferry Smith Company executed and delivered a deed for said real estate.

On the 14th day of November, 1916, Joseph S. Mack and others organized the Mack Copper Company, a corporation, for the purpose of taking over the contract of sale that the said Joseph S. Mack had entered into with the Sam Ferry Smith Company, which contract had been assigned to Caro-

line J. Mack, and which was accepted by the resolution of the company's board of directors on January 2 as follows:

"Meeting of the board of directors of Mack Copper Company, January second, 1917, at Allentown, Pa., at which a quorum was present.

"Upon motion duly made and carried it was

"*Resolved*, That the contract for the purchase from Caroline J. Mack of all of her right, title, and interest in and to lot 78 of the Ex Mission Rancho, San Diego County, California, be and the same is hereby ratified and confirmed as the act and deed of this company.

"Upon motion duly made and carried it was

"*Resolved*, That the officers of the company carry out all of the provisions of the contract with Caroline J. Mack, to completely vest the title of the lands therein described securely in this company, and at once proceed with the development and sale of the land as the subdivision plans drawn call for, not, however, at a less price than will net to the company $250,000 per acre for the first 500 acres, and when this number of acres have been sold a full report shall be made to Caroline J. Mack, and the officers shall do nothing in further disposing of or preparing the land for sale until there is an agreement had by the full board of directors and approved by the stockholders."

On the 27th day of April, 1917, the Sam Ferry Smith Company deeded and conveyed the said real estate, containing 5,039 acres of land, more or less, to the Mack Copper Company, and on said date the Mack Copper Company, by its officers, executed a mortgage upon said real estate to the Sam Ferry Smith Company for the sum of $235,990.00, with interest at six per cent per annum, payable quarterly. During the years 1912 and 1913 Joseph S. Mack and his associates had paid to the Sam Ferry Smith Company the sum of $102,694.82 on the purchase price of said real estate, and this amount, together with the mortgage of $235,990.00, made the total consideration for said deed of conveyance the sum of $338,684.82.

IV. The real estate in question is what is known as mesa lands. It adjoins the corporate limits of the city of San Diego, but that part where the Army camp was located is approximately nine miles from the center of the city of San Diego. The northern and western part is traversed by Rose

Canyon, and San Clemente Canyon traverses the southern and eastern part of said land. All of the land in between Rose Canyon and San Clemente Canyon, and also that part of the land lying south and east of San Clemente Canyon, is what might be termed plateau or table-land, the same being slightly rolling, and at the times hereinafter mentioned all but about 200 acres of it was partly covered with a slight growth of native underbrush. A small stream flows in the San Clemente Canyon during the winter time, but in the summer time it is usually dry. About eighty per cent of the total area of said land is rolling, the remaining twenty per cent being taken up by the two canyons. At places the sides of the canyons are steep, but the soil in the valleys is very rich and fertile and furnishes fine pasturage for stock.

V. At the time the Mack Copper Company acquired the title to said real estate it was the intention of the officers of said company to subdivide said land and dispose of the subdivisions for industrial sites and home sites. Definite plans were made for subdividing said lands, and plaintiff's officers were negotiating with various people with a view to carrying out their subdivision plans, when some time before May 15, 1917, the Government placed a small detachment of soldiers and officers on said land with a view to establishing a cantonment thereon.

VI. As early as May 11, 1917, it became generally known that the Government of the United States was contemplating locating a cantonment in southern California, and the citizens of San Diego began to make every effort possible to have the cantonment located near said city. Citizens' committees were appointed for the purpose of securing leases for lands on which the proposed cantonment could be located. At that time Joseph S. Mack was the only officer and representative of plaintiff corporation in the State of California. The officers and directors of the Mack Copper Company were, at that time, Joseph S. Mack, president and director; Augustus F. Mack, vice president, general manager, and director; Caroline J. Mack, secretary, treasurer, and director. Joseph S. Mack owned three shares out of the fifty thousand shares of the capital stock of said corporation.

Various members of the citizens' committee who were securing leases on land approached the said Joseph S. Mack and asked him to lease plaintiff company's land for a period of five years at and for the consideration of $1.00. Members of this committee informed Mr. Mack that the United States would take the property regardless of whether a lease was executed. Joseph S. Mack refused to enter into any lease agreement and informed the committee that he had no authority to lease the company's land. Without any authority from Joseph S. Mack, or any of the officers of the Mack Copper Company, the Government placed additional troops on the land of the company, and the Government was in full possession of a part thereof before May 26, 1917. On May 26, 1917, Joseph S. Mack was again approached by the citizens' committee and requested to lease the Mack Copper Company's lands to the United States for five years at and for a consideration of $1.00. Mr. Mack again stated that he had no authority to execute a lease on the land. Great pressure was brought to bear on him, and on May 28, 1917, Joseph S. Mack signed a paper antedated May 26, 1917, purporting to lease 2,800 acres of the land of the Mack Copper Company to one F. J. Belcher, jr., trustee.

This lease was executed by Joseph S. Mack, president of the Mack Copper Company, without the knowledge or consent of the officers or board of directors of said company.

A copy of said lease, marked "Exhibit A," is attached to the petition, and is made a part hereof by reference.

VII. Under date of May 21, 1917, certain gentlemen, representing the city of San Diego and the various civic organizations in San Diego, sent the following telegram to General W. L. Sibert, U. S. A.:

SAN DIEGO, CALIFORNIA, *May 21, 1917.*

Gen. W. L. SIBERT, U. S. A.,
Hotel Alexandria, Los Angeles, California:

San Diego offers to give Government five-year lease, rent free, on approximately eight thousand acres of land located on Linda Vista Mesa as shown on topographic map in possession of your board. This property to be used by War Department for Army training purposes. Also agrees to provide site for artillery range. To cause city water to be piped

to the cantonment and be prepared to deliver from one to one and a half million gallons per day on two weeks' notice. To deliver gas and electrical energy to cantonment buildings with necessary wiring, electrical current, delivered within three days and gas within ten days. To cause spur track from main line of Santa Fe to be built to cantonment within two weeks from receipt of notice by railroad company and to provide necessary sidetracks. Construct and maintain necessary highways to cantonment. To use best efforts to secure use of adjoining lands for field maneuvers. Should Government determine upon this locality as site for permanent division cantonment, peace strength, our best efforts shall be expended to acquire and donate necessary land.

City of San Diego, by L. J. Wilde, mayor; George Cromwell, city eng.; San Diego Chamber of Commerce, by W. S. Dorland, president; Army post committee, by F. J. Belcher, jr., chairman; San Diego Consolidated Gas & Elec. Co., by H. H. Jones, general manager; Cabrille Commercial Club, by O. E. Darnell, president; Merchants Association, by Alfred D. LaMotte, president; Manufacturers Association of San Diego, by F. M. White, president.

Under date of May 24, 1917, General Liggett sent the following telegram to F. J. Belcher, jr., chairman of the Army post committee at San Diego:

SAN FRANCISCO, CAL., *May 24, 1917.*

F. J. BELCHER, Jr.
San Diego, Cal.:

Reference telegram May first signed by you and other residents San Diego your proposition give Government five years lease, rent free, approximately eight thousand acres of land on Linda Vista Mesa, is accepted period. Map mailed to you tonight showing location cantonment period. Request you proceed at once carry out your further agreement providing piping for city water to cantonment and delivery gas and electrical energy and to secure construction of spur track from main line Santa Fe. Also to construct and maintain necessary highways to cantonment period. I shall furthermore recommend to War Department locate permanently cantonment approximately division on this site contingent upon donation to Federal Government necessary land for training purposes.

LIGGETT.

It is noted that in the telegram from General Liggett to F. J. Belcher, jr., reference is made to the telegram of May 1st, but it is evident that that date is an error and it had reference to the telegram of May 21, 1917.

At the time that the telegram under date of May 21st was sent to Gen. W. L. Sibert, U. S. A., offering to give the Government a five-year lease, rent free, on approximately 8,000 acres of land plaintiff in this case had not executed a lease to F. J. Belcher, jr., chairman of the Army post committee at San Diego, or to any other person, firm, or corporation. None of the senders of said telegram of May 21st owned any interest in and to the Mack Copper Company real estate, nor did they represent anyone owning any of said real estate.

It does not appear in the evidence whether the 8,000 acres of land located on Linda Vista Mesa and mentioned in the telegram to General W. L. Sibert, U. S. A., under date of May 21st, included plaintiff's land or any part thereof. The topographic map referred to in said telegram is not in evidence in this case.

VIII. In June, 1917, the citizens' committee of San Diego approached Mr. Joseph S. Mack and asked him to sign another lease for additional lands of the Mack Copper Company, and on June 27th the said Joseph S. Mack executed another paper purporting to be a lease for 1,200 additional acres of the Mack Copper Company's lands to F. J. Belcher, jr., trustee, for the sum of $1.00. This paper was not attested by the signature of the secretary or treasurer of the Mack Copper Company, and was made without the knowledge or consent of the board of directors or the officers of the Mack Copper Company. This lease was also antedated and shows on its face that it was executed under date of May 26, 1917, when in truth and in fact it was not executed until a later date.

IX. The first knowledge that any of the officers or directors of the Mack Copper Company had that Joseph S. Mack had executed a lease covering any part of the Mack Copper Company's lands was in August, 1917, when Augustus F. Mack, the vice president and general manager of the

company, returned from Mexico to the city of San Diego. As soon as A. F. Mack was informed that Joseph S. Mack had executed a lease for said lands he informed the Army officers stationed on the land that Joseph S. Mack had no authority to execute said lease. At that time the cantonment was partially completed.

X. F. J. Belcher, jr., did not assign the leases, executed by Joseph S. Mack to him as trustee, to the Government of the United States, but some time in the latter part of October or the first part of November, 1918, the said F. J. Belcher, jr., entered into a lease contract with the United States, represented by Wm. G. Gambrill, colonel, department quartermaster, Western Department, Quartermaster Corps, U. S. Army, wherein and by the terms of which the said F. J. Belcher, jr., directly attempted to lease to the United States a large acreage of lands upon the Linda Vista Mesa, including four thousand acres of the Mack Copper Company's lands, for the term of five years from June 1, 1917, to May 31, 1922, for the sum of $1.00. This paper was not signed by Colonel Gambrill until about November 1, 1918, but it was antedated June 1, 1917.

XI. The United States occupied 4,000 acres of plaintiff's land continuously until November 6, 1921, and during that time it established on said 4,000 acres and other lands not belonging to plaintiff a general camp and cantonment, known as Camp Kearney, using a large area for a parade ground for the Infantry, Cavalry, and Artillery. The parade ground occupied approximately 600 acres. Two concrete roadways were built, running diagonally through the lands, and at places were sunk about 18″ below the surface. In all about 127 buildings and several thousand tent houses were erected for the accommodation of officers and men, which buildings were placed on concrete foundations. Two septic tanks were installed, one on the side of San Clemente Canyon, which carried the sewage from the general cantonment, and one in Rose Canyon, which carried the sewage and drainage from the remount station. Walks and streets were laid out and outlined with cobblestones and rocks, and many of the streets were graveled. An area of approxi-

mately 120 acres was used by the Government in constructing trenches, cross trenches, tunnels, and dugouts for instruction to the troops. In this connection barbed-wire entanglements were constructed.

XII. At times the Government kept as many as 9,000 horses, and on the average about 7,000 horses were kept in the remount area, which consisted of about 200 acres. These horses were chiefly at large corrals. The manure was collected by scrapers, and all of the top soil to a depth of eighteen inches or more was removed down to hardpan. The hardpan was injurious to the horses' feet, so new top soil, stripped from other parts of plaintiff's land, was hauled in and deposited thereon, and this new soil in turn scraped up, sold, and hauled away. All of the manure and top soil scraped with it were sold by the United States. On an average about twenty-five carloads were sold daily, fifty per cent of which was top soil and fifty per cent manure. The United States received on an average $1.50 per ton for the top soil and manure sold, and approximately 200,000 cubic yards of soil and manure were sold, each cubic yard weighing one ton, and the proceeds thereof, $300,000, went to the United States.

It will require an expenditure of about $200.00 per acre to recondition the land used as a remount area.

XIII. The parade ground covered approximately 600 acres. The undergrowth was cut off by the Government and the land leveled by taking the top soil from the higher places and placing it in the lower places. Rock and other materials were hauled from adjacent lands and placed upon the parade grounds in order to give it an even, hard surface. The surface was watered and rolled, oiled, and packed to such an extent that the parade ground became and remains very hard. Where the buildings were erected concrete foundations were set in the ground. Walks and streets were laid out and outlined with cobblestones or rocks brought on the property. The roadways, streets, and paths throughout were made and filled with rock or gravel obtained from a quarry on plaintiff's lands. Thousands of tons of rocks and cobbles were placed on the ground and rolled in by the

Government in leveling the ground and for marking the various company streets. The Government sold the buildings and all property that could be salvaged, the final removal of the same being shortly after June 1, 1922. The purchasers took the pipe fittings from the buildings down to the outlets of the sewer pipes in the ground and left the outlets. In many instances they blasted out the fittings and left the sewers partially wrecked. It will require an expenditure of approximately $500.00 per acre to recondition the soil and put it in the same condition that it was in when the Government took possession.

XIV. The smaller septic tank on the bank of Rose Canyon carried the drainage from the remount and hospital areas through plaintiff's land, not covered by the lease. Both of the septic tanks were either too small or were improperly constructed, as a result of which the raw sewage overflowed from the tanks, and putrid streams with offensive odors flowed down the canyons. From time to time the United States cleaned out the tanks and dumped the sludge therefrom on plaintiff's lands. Approximately 20,000 tons of this sludge taken from the septic tanks were piled on and now remain on plaintiff's lands. One pile of sludge is approximately 300 feet long by 30 to 35 feet in width. It will require an expenditure of approximately $10.00 per ton to remove this sludge from the land.

XV. The Government troops dug numerous trenches, cross trenches, tunnels, and dugouts and placed barbed-wire entanglements on approximately 120 acres of land. This same area was also used for artillery practice and is filled with shell pits and holes produced by exploding mines and shells used by the Army in its maneuvers. It will require an expenditure of approximately $300.00 an acre to restore this area to the condition which it was in when the Government took possession.

XVI. Without the consent of and over the protest of paintiff the Government opened a quarry on plaintiff's land and took therefrom approximately 60,000 cubic yards of rock and gravel. The value of the rock and gravel at the time it was removed was 25 cents a yard.

XVII. During the occupancy by the Government there was constructed 3½ miles of railroad on the lands of the plaintiff, with an average single track fill or embankment of four feet. This embankment still remains on plaintiff's property and consists of stone, gravel, and other hard materials. The rails and railroad supplies were sold by the Government and the bare embankment remains. The cost of removing the embankment and restoring this ground to the condition it was in when the Government took possession would be approximately $17,500.

XVIII. The only means of ingress and egress to and from the 1,039 acres of plaintiff's land, not covered by the lease, was over the 4,000 acres occupied by the Government. The Government refused the plaintiff the right to go across the 4,000 acres that it was occupying, although plaintiff repeatedly requested so to do. At times the Government pastured its horses on this 1,039 acres.

XIX. In the year 1913 Joseph S. Mack and Augustus F. Mack, who held the contract of purchase from the Sam Ferry Smith Company, developed a water supply on the lands in question. A surface well was dug in Rose Canyon and a pump operated by a windmill. An abundant supply of water was produced during the year 1913. During the dry part of that year, 1,000 head of cattle and 3,000 head of sheep were grazed and watered on the land. The rental value of the land during the year 1913 for pasturage purposes was approximately $10,000. At the time the Government took possession of the land the windmill and pump were still standing on the property. There was also a well in San Clemente Canyon, but it was never used.

XX. Under an arrangement with the War Department plaintiff company was permitted to drill for oil on an 80-acre tract of land lying in San Clemente Canyon, and on April 3, 1920, plaintiff started with a well, and at a depth of about 375 feet struck an enormous flow of water. The water was cased off and the well proceeded to a depth of about 1,500 feet and abandoned. Subsequent to the return of the property to plaintiff and during the year 1924 the plaintiff perforated the casing about 375 feet below the surface by the

explosion of a shot of dynamite, whereupon the water rose in the pipe to within approximately 130 feet of the surface. Pumps were installed, and since that time this one well has produced a sufficient amount of water to properly irrigate 200 acres of land, and there has been no perceptible decrease in the water supply by reason of such irrigation.

XXI. At the time the Government took possession of the 4,000 acres of plaintiff's land, said land was of the value of approximately $200.00 per acre. The 1,039 acres of plaintiff's land that were not covered by the lease, but which land was used by the Government, were of the value of $175.00 per acre.

XXII. At the time the Government took possession of the 4,000 acres of plaintiff's land the rental value of the same for grazing purposes, in the condition in which the land was, and without water, was from 25 cents to 50 cents per acre per annum. The rental value of the said 4,000 acres for grazing purposes, with the supply of water that had been developed on said land at the time the Government took possession of the same, was $4.00 per acre per annum. Part of the 4,000 acres, or approximately 200 acres, had been leveled and the underbrush removed and was suitable for farming purposes. At the time the Government took possession of the same, without water, the fair rental value of said land for farming purposes was $15.00 per acre. With water the fair rental value of said land for farming purposes was $45.00 per acre.

The fair rental value of the 1,039 acres of land, not covered by the lease, but which were used by the Government, was $5,000.00 per annum.

Since 1924 there has been an abundant supply of water to irrigate at least 500 acres of land.

The Government cleaned the underbrush off of about 1,000 acres of the land. It requires an expenditure of about $15.00 per acre to clear the underbrush off and level said land so as to make it suitable for farming.

The court decided that plaintiff was entitled to recover for the value of the use and occupation of its property by the

defendant the sum of $79,500, and for the value of soil removed and sold $150,000, a total of $229,500, with interest on $150,000 thereof at six per cent per annum from June 1, 1922, to date of payment.

GRAHAM, *Judge*, delivered the opinion of the court:

We have adopted the findings of the commissioner in this case as they were not excepted to by either party and on the argument were admitted to be satisfactory to both.

The plaintiff, on and for sometime prior to May 15, 1917, had been and was the owner in fee simple of a tract of 5,039 acres of land near the city of San Diego, California. On or before that date the defendant took possession of this land, placed thereon a detachment of officers and soldiers with a view to establishing a cantonment, and for five years thereafter, until about June 1, 1922, occupied and used the said 4,000 acres as a cantonment or training camp, and erected thereon buildings, roads, sewers, railroad embankment, using a large area as parade grounds, and otherwise using it as more fully described in the findings. At times it also used the remaining 1,039 acres of the said 5,039-acre tract for pasturing horses.

It is to be assumed that said possession of the property was taken and the troops were encamped thereon prior to May 15, 1917, under and by proper authority. This property was owned by the plaintiff, possession of it was taken by the defendant with the knowledge that it was not the owner thereof and under no claim of right to its possession and use, for at this time no definite steps had been taken to secure for it a lease of the property, and it did not have a lease. It is, however, reasonable to assume that it took possession in the expectation of later securing a lease for which compensation would be made to the owner. The plaintiff company after possession was taken took no steps to dispossess the defendant and apparently acquiesced in and consented to the act of taking and occupation. It was a peaceable appropriation of the land for a legitimate purpose and use and acquiesced in by the plaintiff.

After the property had been taken possession of certain citizens of San Diego, on the 28th of May, procured what

purported to be two leases, covering 4,000 acres, from the plaintiff, with one of their number, Belcher by name, as trustee. This lease was signed by Joseph S. Mack, president of the plaintiff company, who did so under great pressure and with the statement that he had no authority to sign it, and in fact he did not have. Thereafter the said Belcher, as trustee, on November 1, 1918, executed a lease to the defendant by which he attempted to lease (Finding X) the tract of land heretofore mentioned, with other tracts, for a period of five years. The lease was dated back to May 26, 1917, as was the acknowledgment thereto.

We are of opinion that the Government never had, so far as the record shows, any valid lease of the plaintiff's property for any period of time. It will therefore be seen that, having taken possession of the property under the expectation of procuring a lease, for which some compensation would be made to the plaintiff, and having never obtained the lease and at the same time retaining possession of and using the property, it became liable to compensate the plaintiff for the value of said use and occupation. The findings have fixed the reasonable value of the said use and occupation at $79,500.

The defendant during the occupancy of the plaintiff's property scraped up the soil over about 200 acres, which it sold to third parties and for which it received the sum of $150,000. This was a taking and appropriation of plaintiff's property for which it is entitled to recover compensation in the sum of $150,000 with interest.

There are other claims connected with the use and occupation of the property in the nature of waste for which the defendant is not liable, as it did not hold the property under a lease and there could arise no implied covenants under which relief could be given.

Judgment should be entered for the plaintiff in the sum of $229,500, with interest on $150,000 thereof at 6% from June 1, 1922, to date of payment, and it is so ordered.

MOSS, *Judge;* HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

HOUSTON, EAST & WEST TEXAS RAILWAY COMPANY v. THE UNITED STATES

[No. A-240. Decided June 6, 1927]

On the Proofs

Railroad rates; impedimenta; party movements; free baggage.—The transportation of impedimenta over plaintiff's lines on bills of lading, in connection with a movement of troops, must be paid for at the established rates for freight, and deduction therefrom under a rule which allows one baggage car free for every twenty-five fares is unauthorized.

Same; accounting with Railroad Administration.—Where transportation has been correctly paid for by a disbursing officer, the accounting officer, ruling that it has been overpaid, deducts the amount of the supposed overpayment from an account rendered by the United States Railroad Administration for transportation furnished the Government during Federal control, and said amount is thereafter charged to the carrier by the Director General of Railroads and paid by it to him in cash, the carrier can recover.

The Reporter's statement of the case:

Messrs. William R. Harr and *Charles H. Bates* for the plaintiff.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation of the State of Texas.

II. In November, 1917, the War Department of the United States made three shipments of Army impedimenta over plaintiff's lines of railroad, as freight, upon Government or commercial bills of lading, for which transportation plaintiff rendered its bills to the defendant in accordance with the published freight tariffs.

III. In settlement of two of its bills, both numbered Q-4613-4, the Auditor for the War Department, per settlement No. 57434, dated June 28, 1920, disallowed a total of $968.42 upon the ground that the Government was entitled to one baggage car free for every 25 fares.

Opinion of the Court

Plaintiff's bill Q-4073-12, in the amount of $272.52, covering the third shipment, was paid in full by a disbursing officer. Subsequently the Auditor for the War Department deducted the amount of $207.62 from an account rendered by the Railroad Administration for transportation furnished by it during the period of Federal control, upon the ground that the Government was entitled to one baggage car free for every 25 fares. This amount of $207.62 was charged back to the plaintiff by the Director General and, prior to the final settlement of the plaintiff corporation with the Director General, was adjusted through a cash payment made by the corporation to the Director General of the full amount of such deduction.

Plaintiff filed a protest against the action of the Auditor for the War Department in making the disallowance and deduction above stated.

The court decided that plaintiff was entitled to recover $1,176.04.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The case is before the court upon a stipulation of facts. These present two questions, both of which have been determined in prior cases.

(1) The plaintiff having transported upon Government bills of lading certain shipments of horses, wagons, tents, rations, and other impedimenta, rendered its bills in due course in the amounts of $1,033.32 and $272.52, respectively. The Auditor for the War Department disallowed $968.42 of the first item upon the ground that the Government was entitled to one baggage car free for every 25 men transported, the movement involving the transportation of troops. This deduction was unauthorized. See *Missouri Pacific R. R. Co. case*, 56 C. Cls. 341; *United States* v. *Reading Co.*, 270 U. S. 320, 323.

(2) The second item mentioned is on account of transportation furnished by the plaintiff for which it rendered its bill and the same was paid. Afterwards the accounting

officers in settling the disbursing officer's accounts refused to allow the payment because of the ruling of the comptroller that the Government was entitled to one baggage car free for every 25 men transported in a troop movement. To adjust this supposed overpayment, there was deducted from bills of the Railroad Administration, then having plaintiff's line under Federal control, the amount of the overpayment, $207.62, and thereafter the plaintiff paid the amount to the Director General of Railroads. As already said, the deduction by the accounting officers was erroneous, and the settlement between plaintiff and the Railroad Administration established the former's right to recover the amount deducted. *Reading Co. case*, *supra*.

Plaintiff should have judgment for both items. And it is so ordered.

MOSS, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.
GRAHAM, *Judge*, took no part in the decision of this case.

ARMA ENGINEERING COMPANY v. THE UNITED STATES

[No. E-121. Decided June 6, 1927]

On the Proofs

Settlement contract; expense of defending suit brought by subcontractor.—Where an order for the manufacture of certain articles is suspended and a contract of settlement duly entered into between the contractor and the Government which recites the fact that suit has been filed against the contractor by a subcontractor, arising out of the suspension of the said order, and that "reimbursement to the contractor * * * shall include the reasonable necessary expenses of a proper defense of the said suit now pending against said contractor," the contractor is entitled to be so reimbursed.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the brief.

Mr. Howard W. Ameli, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Joseph Henry Cohen* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized under the laws of the State of New York, with its principal office in the Borough of Brooklyn, city of New York.

II. December 13, 1918, the plaintiff entered into a contract with the United States, represented by Captain F. D. Schnacke, Air Service, U. S. Army, for the manufacture and delivery of 5,000 of a special type of aero-navigation sets, deliveries and prices to be as specified in an order theretofore given by the Air Service, known as Order 750186.

III. The plaintiff company promptly proceeded with the work of procuring necessary materials, making plans, and doing other things to insure delivery of the sets in the time agreed upon, and it made subcontracts with others for supplying certain of the necessary parts of the sets. One of the subcontracts so made was with the Metallograph Corporation for 5,000 sets of scales, one of the necessary parts for each navigation set to be made under the principal contract. Order was placed with said corporation for such scales January 15, 1919, and accepted by the subcontractor on that date.

IV. By telegram January 25, 1919, the Air Service notified the plaintiff of a contemplated reduction in the contract number of navigation sets to be produced, and by letter of January 27, 1919, gave formal advice of a reduction in the contract quantity to 10. Upon advice of this reduction plaintiff immediately stopped all work in its shops, canceled all orders for materials not already received at its plant, and notified its subcontractors, including the Metallograph Corporation, to stop work on all parts in excess of those required for completing 10 sets.

V. Plaintiff also notified defendant that it had stopped work, and defendant sent an accountant to examine plaintiff's records. A settlement was negotiated between plaintiff and defendant whereby the defendant was to pay the plaintiff, which it did, $15,163.90, in full settlement of all

Reporter's Statement of the Case

claims under the original contract of December 13, 1918, except a claim of the Metallograph Corporation, one of its subcontractors. The defendant considered, after a visit of its inspector to this corporation's plant, that there was a difference between the status of the work reached by the corporation and that which its inspector had observed, and that the corporation was making an exorbitant claim, and at the suggestion of the defendant no settlement was made with the Metallograph Corporation, and the latter entered suit against plaintiff in the State of New York.

VI. A written contract of settlement was entered into October 15, 1919, between plaintiff and defendant. A copy of this contract is attached to the petition marked "Exhibit A," and is made a part hereof by reference.

VII. Plaintiff kept defendant fully advised as to the progress of the suit against it by the Metallograph Corporation. It succeeded in having the case dismissed in the trial court. There was an appeal by the Metallograph Corporation to the appellate division and then to the Court of Appeals of New York, with the final outcome of a judgment against the Arma Engineering Company for $18,191.64.

VIII. When sued by the Metallograph Corporation plaintiff employed competent counsel to defend the suit. This employment was known to defendant and it was kept informed of the progress of the suit. Said attorney handled all legal matters for plaintiff connected with the suit, including court work, from the time of service of subpœna in the case up to the time it was turned over to the defendant for defense in the appellate division of the Supreme Court, which defense was made by an attorney of the Department of Justice.

Plaintiff's costs in connection with the employment of the attorney representing it up to the time of this substitution were $1,750 for services, $433.01 for necessary expenses. The attorney's charge for services rendered was reasonable; the expenses incurred, $433.01, together with cost of bond on appeal, were necessary and reasonable.

At the conclusion of the case on appeal the United States attorney then in charge of the case informed the plaintiff

Opinion of the Court

that the Court of Appeals had decided the case against it and that it would, therefore, be obliged to pay the judgment, which it did. The judgment was made up as follows:

Judgment Apr. 26, 1923	$17, 517. 62
Interest to Oct. 26, 1923	525. 52
Printing points (Court of Appeals)	58. 50
Costs—Court of Appeals before argument	30. 00
For argument	60. 00
	18, 191. 64

The plaintiff, after having paid this sum together with the attorney's fee and incidentals amounting to $2,739.51, made claim on defendant under the contract of October 15, 1919, for reimbursement, and defendant referred said claim to the General Accounting Office with the recommendation that it be paid. By decision of the Comptroller General, March 17, 1924, the plaintiff was allowed $13,400, which it has received, and its claim for the balance disallowed. It has never been paid all or any part of its expenses of defending suit of the corporation or of the court costs paid by it in so doing, amounting in the aggregate to $7,531.15.

The court decided that plaintiff was entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

The plaintiff, a corporation, on December 13, 1918, entered into a written contract with the United States whereby it agreed to manufacture and deliver five thousand aero-navigation sets of a special type. The plaintiff proceeded to procure the necessary materials, and to make subcontracts with others for supplying certain of the necessary parts of the sets. One of its subcontracts was made with the Metallograph Corporation for five thousand sets of scales, one of the necessary parts for each navigation set, which the plaintiff had agreed to make. The order for these scales was placed with the said corporation on January 15, 1919, and accepted on that date.

By telegram of January 25, 1919, the Air Service notified the plaintiff that a reduction in the number of sets was contemplated, and by letter of January 27, 1919, gave the plain-

tiff formal notice that the number of sets must be reduced from five thousand to ten sets. The plaintiff upon receiving this notice immediately stopped all work in its shops, canceled all orders for material not already received, and notified the Metallograph Corporation to stop work on the scales ordered from it in excess of those required for completing ten sets.

A settlement contract was made on October 15, 1919, between the plaintiff and the United States for the sum of $15,163.90, which was in full settlement of all claims of the plaintiff, except a claim of the Metallograph Corporation above referred to. The United States, after an examination of this claim, considered it exorbitant, and suggested to the plaintiff that no settlement should be made by it with the Metallograph Corporation, whereupon the said corporation entered suit against the plaintiff in the courts of the State of New York.

The defendant was kept fully advised by the plaintiff as to the progress of this suit, which was carried on by the plaintiff for the benefit of the United States. In the trial court the suit was dismissed. The Metallograph Corporation took an appeal to the appellate division and then to the Court of Appeals of New York, which last-named court entered a judgment against this plaintiff in the sum of $18,191.64. The plaintiff employed competent attorneys to defend the suit in the trial court, which employment was known to the United States. When the case was appealed the plaintiff was represented in the higher court by an attorney of the Department of Justice.

Plaintiff's costs in connection with the employment of an attorney up to the time the United States took over the defense of the case were $1,750 for services and $433.01 for necessary expenses, both of which charges were reasonable. At the conclusion of the litigation the plaintiff was advised by the United States attorney in charge of the case that it would have to pay the judgment, which it did; the judgment was made up as follows:

Opinion of the Court

Judgment Apr. 26, 1923	$17,517.62
Interest to Oct. 26, 1923	525.52
Printing points (Court of Appeals)	58.50
Costs—Court of Appeals before argument	30.00
For argument	60.00
	18,191.64

The plaintiff after having paid the judgment, together with the sum of $2,739.51, attorneys fees and costs, made claim under the contract of October 15, 1919, for reimbursement, and the United States referred the claim to the General Accounting Office with the recommendation that it be paid. By decision of the Comptroller General March 17, 1924, the plaintiff was allowed $13,400, which it has received, and its claim for the balance was disallowed. This balance represented the cost incurred by the plaintiff in defending the suit brought by the Metallograph Corporation against it, and amounts to the sum of $7,531.15.

The decision of the case depends upon the construction to be given to the following clause of the contract of October 15, 1919:

"The contractor does hereby for itself, its successors and assigns, remise, release and forever discharge the Government of and from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims and demands whatsoever due or to become due in law or in equity under or by reason of or arising out of said original contract, save and except the claim of the Metallograph Company, 1102 Brooks Avenue, New York City, one of the subcontractors holding a commitment from the contractor under said original contract, who has filed suit against the contractor arising out of the suspension of the original order mentioned herein. The Government, in order to protect said contractor against said suit of the Metallograph Company, hereby assumes and agrees to pay the just and proper claim of said Metallograph Company, under the commitment of said contractor, growing out of the said suspension of said order by the Government, when the same is legally established by suit or the amount thereof is determined and certified to as proper and just by the liquidation division of the Air Service. Reimbursement to the contractor hereunder shall include the reasonable necessary expenses of a

proper defense of the said suit now pending against said contractor. To the end that said suit of the Metallograph Company may be rightfully and properly defended in the interest of the contractor and the Government, the contractor agrees to aid and furnish all necessary information that it may have in the prosecution of said suit to the Government, without any additional expense."

Here we have an express agreement between the parties that the plaintiff should be reimbursed for the reasonable and necessary expenses of a proper defense of this suit, which at the time of the making of the contract was pending against the plaintiff. By what theory can the United States agree to pay the just and proper claim of the Metallograph Corporation, "when the same is legally established by suit," and yet refuse to pay to the plaintiff the cost which it incurred not for its own benefit but for the benefit of the United States? If the United States had been named the defendant, instead of the Arma Engineering Company, in the suit brought by the Metallograph Company the United States would have been compelled to pay the expenses and costs which it now claims the plaintiff should pay. But, after all, the provisions of the contract are clear and unmistakable. The United States are bound by these, and the plaintiff must be reimbursed.

The defendant raises some question as to whether there was authority under the contract of December 13, 1918, to make the contract of October 15, 1919. We have no evidence in this record as to what the provisions of the contract of December 13, 1918, were. That contract is not in evidence. We are clear that the contract of October 15, 1919, was made between the parties in good faith, and that the person executing it on behalf of the United States had authority to execute it and bind the United States by its terms.

Judgment will be awarded the plaintiff in the sum of $7,531.15. It is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

GRAHAM, *Judge,* took no part in the decision of this case.

CHICAGO & EASTERN ILLINOIS RAILWAY COMPANY v. THE UNITED STATES

[No. C-55. Decided June 6, 1927]

On the Proofs

Mail pay; car storage space; unused space on return trip; retroactive order of Interstate Commerce Commission; failure of Post Office Department to restate service.—The rate of pay for storage space of cars on round-trip mail routes, as fixed retroactively by the Interstate Commerce Commission, applies upon the return trip where no part thereof was used by the railroad company, and the carrier's right thereto is not defeated by the failure of the Post Office Department to restate the service accordingly.

The Reporter's statement of the case:

Mr. Thomas P. Littlepage for the plaintiff. *Mr. Sidney F. Taliaferro* was on the brief.

Mr. Joseph Stewart, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. George H. Foster* was on the brief.

This case was submitted to the court upon the pleadings and the stipulation as to evidence. The court accordingly adopted the stipulation as and for its special findings of fact, as follows:

Whereas there has been heretofore filed a petition in this case in which the plaintiff claims a grand total of $35,390.-0470, which grand total is made up of many hundreds of small amounts; and

Whereas it is the desire of both of the parties hereto to avoid the taking of long and tedious formal testimony; and

Whereas the defendant has, at the request of the plaintiff, carefully reviewed and checked its record and found that the items in dispute amount to the grand total of thirty-five thousand four hundred ninety dollars and two cents ($35,-490.02), ($99.97 more than the grand total as stated in plaintiff's petition);

The parties hereto stipulate, undertake, and agree as follows:

(1) Thirty-five thousand four hundred ninety dollars and two cents ($35,490.02) is the amount which the plaintiff is entitled to recover under the items set up in the petition, if entitled to any recovery at all.

(2) The plaintiff's petition shall be, with the approval of the court, treated as hereby amended *nunc pro tunc* so as to claim the sum of thirty-five thousand four hundred ninety dollars and two cents ($35,490.02).

(3) The facts set forth in the petition as to the authorized service performed by the plaintiff and also as to the return of empty mail car units, the latter being the basis of the plaintiff's claim, are correct.

(4) The defendant expressly reserves all its rights of defense of every kind and character except as hereinbefore stated.

The court decided that plaintiff was entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The Chicago & Eastern Illinois Railway Company sues to recover compensation for services rendered in the transportation of mails upon two designated mail routes for the period from November 1, 1916, to December 31, 1917, inclusive. It claims payment for the return trip of "lesser units" of storage space (less than a full storage car) where the Post Office Department "authorized" storage space in one direction only and where upon the return trip no part of the car was used by the railroad company. Plaintiff illustrates its contention as follows: A storage space unit of 30 feet was "authorized" on its line from Chicago to Evansville daily, except Sunday. It was paid for the service one way, and it claims payment for the return of that unit from Evansville to Chicago, as no portion of the car upon such 30-foot unit was used by the company on the return trip. The question naturally arises, why did the department state the service one way instead of by the round trip, and no satisfactory reason is shown for the distinction. It does appear that since March 1, 1920, payment has been made for

the return trip of the "lesser units." The act of July 28, 1916, 39 Stat. 412, 431, authorizes storage space in units of 3 feet, 7 feet, 15 feet, and 30 feet. Section 5 of the act provides that in computing the car-miles of storage cars the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions unless the car be used by the company in the return movement as mutually agreed upon. The Interstate Commerce Commission, as it was authorized to do by the act of 1916, fixed "the fair and reasonable rates of payment" for mail transportation from November 1, 1916, to January 1, 1918, and at a higher rate from and after the last-named date. In its order it provided for computing the space in both directions in the language we have stated from section 5 of the act. Why was not payment made accordingly? The defendant says that "the order of the Interstate Commerce Commission affected retroactively only the rate to be paid for the service and did not authorize or direct a *restatement of the service* itself." It is thus conceded that the commission fixed "the rate to be paid for the service," but the contention is that there was no "restatement of the service itself," by the Post Office Department. We find no difficulty in concluding that if the department did not "restate" the service it should have done so after the commission acted and determined the rate. Authorized as it was to fix a fair and reasonable rate of service, and having performed that duty, the order of the commission should be given effect. There is nothing in the act that authorizes a defeat of the commission's order and finding by the failure of the department to "restate" the service. It having stated the service in the first instance, the compensation prescribed by the commission's order is applicable on the return movement. We think, therefore, that the plaintiff is entitled to recover. The amount is not in dispute, and there is a stipulation to the effect that the statement of the facts in the petition is true. Judgment will be awarded accordingly. And it is so ordered.

MOSS, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.
GRAHAM, *Judge*, took no part in the decision of this case.

ROBERT H. MONTGOMERY v. THE UNITED STATES

[No. D-790. Decided June 6, 1927]

On the Proofs

Income-tax deductions; necessary expenses; contribution to endowment fund; benefits available to public.—Payment made by a firm of accountants into an endowment fund created for the purpose of maintaining a library and statistical department in an institution of which it is a member, available to the general public and to all members of the institution whether contributing to the fund or not, is not a necessary expense within the meaning of the income-tax laws enumerating allowable deductions.

Same; contributions to scientific or educational organizations.—A corporation, which might otherwise be one operated exclusively for scientific or educational purposes, gifts to which are deductible allowances in income-tax returns, is not so operated when it has standing committees whose duty it is to safeguard the interests of its members by efforts to influence legislation.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Mr. J. Marvin Haynes* was on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Robert H. Montgomery, during the year 1917 was a member of the partnership known as Lybrand, Ross Bros. & Montgomery, which firm, during the said year, was engaged in the practice of accounting and auditing in the city of New York and elsewhere throughout the United States.

II. On or about March 27, 1918, the said partnership of Lybrand, Ross Bros. & Montgomery filed its partnership income return for the fiscal year ended December 31, 1917, showing a partnership net income of $260,128.02. The proportion of the plaintiff as a partner in said firm in said net income was $53,335.32, as shown by said return.

Reporter's Statement of the Case

III. On or about May 23, 1916, the Institute of Accountants in the United States of America was incorporated under the laws of the District of Columbia. On or about January 22, 1917, its name was changed to the American Institute of Accountants. The corporation was a successor to a body known as the American Association of Public Accountants, established in the year 1887.

The certificate of incorporation of the American Institute of Accountants provides as its object that it was organized for the purpose of uniting the accountancy profession, to safeguard the interests of public accountants, and to encourage congenial intercourse among accountants.

IV. In the year 1917 the American Institute of Accountants created an endowment fund for the purpose of maintaining a library and statistical department. There was subscribed for this purpose the sum of $200,000.

Said endowment fund has been used for the establishment and maintenance of a library and statistical department and a bureau of information, which conducts research work, and for the publication of technical books for the use of the accounting profession.

The said library and statistical department so established by the said endowment fund was open to all members of the American Institute of Accountants (whether contributing to said fund or not) and to the general public as well.

Only 200 out of the approximate 1,200 members of the American Institute of Accountants contributed to said endowment fund.

V. During the year 1917 the said partnership of Lybrand, Ross Bros. & Montgomery made a contribution of $5,000 to the aforesaid endowment fund of the American Institute of Accountants, to which organization each of the members of said firm belonged.

VI. The American Institute of Accountants had standing committees on Federal legislation and State legislation, whose duty it was to safeguard the interests of public accountants by endeavoring to defeat legislation believed by the organization to lower the standards of the profession, and also to encourage legislation believed to be beneficial to same.

Opinion of the Court

VII. At the time required by law plaintiff made his Federal income and excess-profits tax return for the taxable year 1917 and duly paid the tax shown on said return to be due.

VIII. On or about March 8, 1923, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the said year 1917, amounting to the sum of $253.96. Thereafter the plaintiff, on March 27, 1923, filed with the collector of internal revenue for the second district of New York a claim for abatement of said additional tax. On February 9, 1924, the said claim was allowed in the sum of $63.74 and rejected for $190.22, which sum constituted the amount claimed by plaintiff as the tax on his share of the $5,000 contributed to said endowment fund, and which with interest amounts to $199.73.

IX. On or about April 7, 1924, plaintiff filed with said collector of internal revenue, in accordance with the provisions of law in that regard and the regulations of the Treasury in pursuance thereof, a claim for refund of the sum of $199.73 so paid, or such greater amount as might be legally refundable, with interest thereon from April 4, 1924. On October 7, 1924, the date of the filing of the petition in this cause, six months had elapsed since the filing of the said claim for refund and no decision had been rendered thereon by said Commissioner of Internal Revenue. Since the institution of this suit said commissioner did, on December 11, 1924, formally reject in full the said claim for refund.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

The plaintiff, Robert H. Montgomery, was in 1917 and prior thereto a member of a partnership engaged in the business of accounting and auditing in the city of New York and elsewhere throughout the United States. During that year the partnership paid $5,000 into an endowment fund of the American Institute of Accountants.. In its income-tax return the partnership claimed as a proper deduction from gross income the amount so paid, which claim was disallowed by the Commissioner of Internal Revenue. Plaintiff likewise claimed in his individual return as a proper deduction from gross income his share in the $5,000

Opinion of the Court

the tax on which amounted with interest to $199.73, which was also disallowed by the commissioner, and this action is for the recovery of that amount.

The question involved herein is governed by the revenue act of 1916 (39 Stat. 756), the applicable provisions of which are as follows:

"SEC. 5. That in computing net income in the case of a citizen or resident of the United States (*a*) for the purpose of the tax there shall be allowed as deductions—

"First. The necessary expenses actually paid in carrying on any business or trade, * * *

* * * * * * *

"Ninth (as added by sec. 1201 (2) of the revenue act of 1917). Contributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, * * * no part of the net income of which inures to the benefit of any private stockholder or individual to an amount not in excess of 15 per centum of the taxpayer's taxable net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury."

Considering first the question as to whether or not the contribution to the endowment fund was a *necessary* expense, it should be noted that there were approximately 1,200 members of the institute, only 200 of whom subscribed to the fund, and that the benefits and advantages derived from said endowment accrued to all members, contributors and noncontributors alike, as well as to the general public. The library, which was purchased with the income from said fund, was open to the public free of charge, and the books which were published for research work were sold to the public as well as to the members of the institute. As a matter of right, plaintiff's firm could have availed itself of all the services of the institute without subscribing to the fund. It can not, therefore, be held that plaintiff's subscription was a *necessary* expense in carrying on the business of plaintiff's firm.

Syllabus

On the second point the question for determination is whether or not the American Institute of Accountants was a corporation or association organized and operated *exclusively* for scientific and educational purposes. One of the purposes set forth in its article of incorporation was "* * * to safeguard the interest of public accountants * * *." In furtherance of this purpose Article IV of the constitution provided for the appointment of certain committees, one of which was for Federal legislation, and another was for State legislation. The evidence shows that whenever and whereever efforts were made to enact legislation which, in the belief of the American Institute of Accountants, would result in lowering the standard of qualification for admittance to membership in the institute every reasonable effort was made by these committees to defeat such legislation. It was also a part of the duty of said committees to procure legislation believed to be suitable for the purposes of the institute where no such legislation already existed. Conceding that this service might be regarded as entirely meritorious it is, nevertheless, a scope of activity which is clearly incompatible with the spirit and purpose of the exempting statute.

It is the opinion of the court that plaintiff is not entitled to recover.

It is therefore adjudged that the petition herein be, and the same is, dismissed.

HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

GRAMAM, *Judge*, took no part in the decision of this case.

JOHN S. KERNACHAN v. THE UNITED STATES

[No. E–28. Decided June 6, 1927]

On the Proofs

Income tax; value of land as of March 1, 1913; finality of finding by Commissioner of Internal Revenue.—A finding of the Commissioner of Internal Revenue of the value of a taxpayer's land as of March 1, 1913, for the purpose of determining the amount of profit, if any, under the income-tax laws resulting from a sale thereof, is not conclusive upon the Court of Claims.

The Reporter's statement of the case:

Mr. Oscar W. Underwood, jr., for the plaintiff. *Underwood & Kilpatrick* were on the briefs.

Mr. Thaddeus G. Benton, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, John S. Kernachan, is a citizen of the United States and a resident of Florence, Ala. This action has been brought by the plaintiff to recover from the United States the sum of $3,678.32, with interest, being an income tax which he alleges was erroneously and illegally collected from him.

II. About 44 years ago the plaintiff acquired by inheritance the fee simple title to 1,800 acres, more or less, of land in Colbert County, Ala., abutting the Tennessee River and contiguous to Little Muscle Shoals. On August 12, 1918, the plaintiff sold to the United States 908.43 acres of said 1,800 acres, more or less, at the price of $72,000.00.

III. The plaintiff on March 15, 1919, filed his income-tax return under the revenue act of 1918, Title II (40 Stat. 1058, et seq.), for the calendar year 1918 and in so doing declared neither gain nor loss from the sale of said 908.43 acres. Said return disclosed a net income of $3,383.95 and a tax liability of $83.04, which amount the plaintiff paid on March 15, 1919.

IV. The Commissioner of Internal Revenue under date of November 16, 1923, addressed a letter to the plaintiff, claiming an additional tax for the calendar year 1918, above that paid by the plaintiff under his aforesaid return, of $4,790.01, and stating that the plaintiff's net income had been increased from $3,383.95 to $29,772.20, under the plaintiff's amended return, filed on or about October 10, 1923. The amended return was filed not by the plaintiff but by the deputy collector of internal revenue. Under date of December 19, 1923, the Deputy Commissioner of Internal Revenue advised the plaintiff that the proposed additional assessment of $4,790.01 was correct, and that the same was occasioned by the placing of a valuation of $50 per acre as of March

1, 1913, on the said land sold to the United States in 1918, upon which basis a profit to the plaintiff of $25,678.50 had resulted from said sale. Thereafter the collector of internal revenue at Birmingham, Ala., on or about February 1, 1924, made demand upon the plaintiff for the payment of $4,790.01 and on February 6, 1924, the plaintiff paid that sum to the collector.

V. Thereafter, on April 7, 1924, the plaintiff, on Treasury Department, Internal Revenue Service, Form 843, filed a claim for refund of said $4,790.01 with the Commissioner of Internal Revenue, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof. In said claim the plaintiff contended that the said 908.43 acres of land sold by him on August 12, 1918, to the United States had a fair market value on March 1, 1913, of $100 per acre, and that since said property was worth on that date more than the $72,000 he had received for it in 1918 from the United States, he had made no taxable profit through the transaction, and, therefore, demanded the return to him of said $4,790.01 and interest. With his claim for refund the plaintiff filed evidence in affidavit form.

VI. Thereafter, on December 5, 1924, the Commissioner of Internal Revenue, acting by and through one J. G. Bright, deputy commissioner, by letter dated that date and mailed to the plaintiff, rendered a decision on said claim by allowing a part of said claim to the extent of $961.55, and authorizing the refund of that amount to the plaintiff, and by disallowing a part of said claim, namely, the balance of the amount claimed by the plaintiff above $961.55, and it is to the disallowed part of such claim that this suit relates.

This refund was not based upon an increase by the Commissioner of Internal Revenue of the valuation he placed upon the land in question as of March 1, 1913, but was based upon an allowance by the commissioner for certain improvements existing upon said land on March 1, 1913.

VII. In rendering the decision set forth in Finding VI the commissioner determined that the value on March 1, 1913, of the said 908.43 acres was $50 per acre ($45,421.50).

The commissioner therein allowed $6,000 as the cost of improvements placed on the property subsequent to March 1, 1913, but deducted therefrom $1,160 as depreciation on said improvements at the rate of 4 per cent per anum for 4⅚ years. The buildings and improvements placed upon the land subsequent to March 1, 1913, and which the plaintiff could not remove, but sold to the United States as a part of the property conveyed for the consideration of $72,000, were worth net, on August 12, 1918, when said sale was made, at least the amount of $4,840 allowed by the commissioner therefor, wholly apart from the value of his 908.43 acres, as agricultural land.

VIII. The reasonable and fair value of the said 908.43 acres of land as of March 1, 1913, was $75 per acre, with a total value of $68,122.25, exclusive of the value of any buildings and improvements thereon. The land was of the kind known as river-bottom land and was kept in a highly developed state of cultivation by the plaintiff.

IX. The plaintiff admits that a tax of $150.14 was due the United States, arising as follows: In filing his return for 1918 the plaintiff declared a net taxable income of $3,383.95. There should have been deducted from that sum $207.45 as interest on United States obligations. The commissioner allowed this deduction. There should have been added to plaintiff's taxable income $709.75, which comprised other items than those involved in this suit and which the plaintiff conceded when a revenue agent audited his return. The commissioner's said letter of November 16, 1923, was based on figures which included said $709.75 in the plaintiff's net income. The plaintiff's correct net income was therefore $3,886.25, which was subject to a normal tax of 6 per cent, namely, $233.18. The plaintiff paid $83.04 under his return as aforesaid, and the United States is entitled to retain $150.14 in addition thereto out of the amount paid by the plaintiff under the collector's demand as aforesaid. Credit has been given the United States for said $150.14, and the amount claimed in this petition, $3,678.32, is the balance collected from the plaintiff above and beyond the said amount of $150.14.

The court decided that plaintiff was entitled to recover the sum of $3,678.32 with interest thereon from February 6, 1924, to date of judgment, an aggregate of $4,413.98.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover from the United States the sum of $3,678.32, which he claims was illegally and erroneously collected from him by the Commissioner of Internal Revenue. The sole question involved in this case is what was the value of 908.43 acres of land owned by the plaintiff on March 1, 1913. On that date the plaintiff was the owner of said land, and had been the owner thereof for many years before that date.

On August 12, 1918, the plaintiff sold said land to the United States at the price of $72,000. The plaintiff on March 15, 1919, filed his income-tax return under the revenue act of 1918 for the calendar year 1918, and in so doing declared neither gain nor loss from the sale of the said 908.43 acres. Thereafter on November 16, 1923, the Commissioner of Internal Revenue claimed that the plaintiff owed an additional tax for the calendar year 1918, claiming that the additional assessment was occasioned by the placing of a valuation of $50 per acre as of March 1, 1913, on the 908.43 acres of land sold to the United States in August, 1918. Under protest the plaintiff paid the additional assessment on February 6, 1924. On April 7, 1924, the plaintiff filed his claim for the refund of the amount so paid. The commissioner allowed a part of said claim, to wit, the sum of $961.55, and disallowed the balance of the amount above the $961.55. The part of the claim allowed was based on the cost of improvements placed on the land since March 1, 1913, but the commissioner adhered to his decision that the land was only of the value of $50 per acre as of March 1, 1913.

The statute under which the Commissioner of Internal Revenue acted in this case reads as follows:

"SEC. 202. (*a*) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be: (1) In the case of property acquired before March 1, 1913,

Syllabus

the fair market price or value of such property as of that date."

We are of opinion that the reasonable value of the 908.43 acres sold by the plaintiff to the United States in August, 1918, was on March 1, 1913, $75 per acre. It follows therefore that a judgment must be awarded the plaintiff for the amount for which he sues.

The Government, however, contends that this court can not alter, modify, set aside or disregard the finding of the Commissioner of Internal Revenue of the value of plaintiff's land as of March 1, 1913, unless it is affirmatively shown that the commissioner in fixing the value of the land proceeded upon an erroneous principle, or adopted an improper mode of estimating the value of the land, or unless fraud appears, or unless a perfectly clear and unquestioned preponderance of the evidence shows that the commissioner committed gross error.

This contention has been repeatedly made in these cases, and this court has passed upon it in a great many cases. It is not necessary to again give the reasons for our former rulings. It is sufficient to say that the contention is not tenable.

Judgment will be awarded the plaintiff for the sum with interest for which he sues. It is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

INTERNATIONAL CURTIS MARINE TURBINE COMPANY v. THE UNITED STATES

[No. D-174. Decided June 6, 1927]

On the Proofs

Income-tax deductions; depreciation; value of licenses.—The deduction authorized from gross income of "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade" applies to patent license contracts from which, and the licenses authorized

thereby, substantially all of a corporation's income is derived and which, because of their ultimate expiration, decrease in value from year to year.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery* and *J. Marvin Haynes* were on the brief.

Mr. John A. McCann, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. J. Robert Anderson* was on the brief.

The court made special findings of fact, as follows:

I. At the time of the filing of this action and at all times hereinafter mentioned plaintiff was a corporation duly organized under the laws of the State of West Virginia, having its principal place of business in Jersey City, in the State of New Jersey.

II. Plaintiff filed its income-tax return for the year 1916 and its income and excess-profits tax returns for the year 1917 in accordance with the facts as it believed them to exist, and paid the taxes shown on such returns to be due. In each of said returns plaintiff deducted the sum of $120,000 from its gross income for depreciation in the value of its property.

III. Both of these returns were audited by the Commissioner of Internal Revenue, and as the result of said audit, the commissioner denied plaintiff the right to deduct the sum of $120,000 for depreciation in the value of its property and assessed additional taxes against plaintiff in the sum of $2,400 for the year 1916, and in the sum of $27,653.71 for the year 1917.

IV. Plaintiff immediately filed a claim for abatement of the additional assessment for the year 1916, which was rejected by the commissioner, and on February 3, 1923, plaintiff paid under protest to the collector of internal revenue for the second district of New York the full amount of the additional assessment for the year 1916, amounting to $2,400, and on July 13, 1923, plaintiff paid under protest to the said collector the additional assessment for the year 1917, amounting to the sum of $27,653.71.

V. In August, 1923, plaintiff filed with the collector of internal revenue for the second district of New York a claim for refund of the sum of $27,653.71, with interest from July 23, 1923, and on November 9, 1923, plaintiff filed with said collector a claim for refund of the sum of $2,400, together with interest thereon from February 3, 1923. Both of said claims for refund were disallowed by the Commissioner of Internal Revenue and plaintiff was notified of the disallowance by letters dated December 10, 1923, and December 20, 1923, respectively. Neither of said claims for refund of the additional assessment has been allowed by the commissioner. The total amount thereof, to wit, $30,053.71 is now held and retained by the United States.

VI. The first steam turbine was invented by Charles A. Parsons, a British subject. It was brought out in 1890. In 1896, Charles G. Curtis, a citizen of the United States, invented another steam turbine, in many ways different in principle from the Parsons turbine. Marine engineers were slow to accept either type, and as a result the growth of the turbine was very slow until about 1907. Subsequent to 1907, the growth and development was very rapid. As of March 1, 1913, there were three turbines on the market, viz, Parsons, Curtis, and Zoelly, and the Curtis type was the equal of either of the others.

On September 1, 1896, the basic patents on the Curtis turbine were issued to Mr. Curtis by the United States. Similar patents were also issued at the same time in Great Britain, France, Belgium, Germany, Norway, Sweden, and Canada. Subsequently various subsidiary patents were issued to Mr. Curtis up to and including 1902. These basic patents were assigned to a corporation known as the Curtis Company. This company on October 7, 1897, granted a license to the General Electric Compay to manufacture and sell steam turbines covered by the Curtis patents as prime movers for dynamo-electric generators upon payment of certain royalties. Between 1897 and 1902 two corporations, the Curtis Steam Turbine Company and the International Curtis Steam Turbine Company were formed. The Curtis Steam Turbine Company was organized to take over and

deal with the United States rights under the Curtis patents, and the International Curtis Steam Turbine Company was organized to take over the foreign rights.

VII. In June, 1902, an agreement was entered into by and between the Curtis Steam Turbine Co., the International Steam Turbine Co.—both being corporations organized under the laws of West Virginia—and the General Electric Co., a corporation organized under the laws of New York, which agreement was supplemented by a contract dated June 17, 1902, to which Charles G. Curtis was also a party, and modified by a contract dated May 1, 1903. By the terms of these agreements, the Curtis companies assigned to the General Electric Co. all of the patents and applications for patents, both domestic and foreign, issued to or applied for by Charles G. Curtis up to that time, relating to steam turbines. The Curtis Steam Turbine Co., however, reserved to itself the exclusive license throughout the United States and its territories and dependencies, under such inventions for marine and aerial propulsion, and the International Curtis Steam Turbine Co. reserved an exclusive license under such patents for marine and aerial propulsion throughout the world, except the United States and its territories and dependencies. The effect of these agreements was that the General Electric Co. acquired the land rights in the Curtis patents except for continental Europe and the Dominion of Canada and the Curtis companies acquired the aerial and marine rights throughout the world, and the land rights in continental Europe and Canada, except that the allies of the General Electric Co. had the right to engage in the steam turbine business in continental Europe and the Dominion of Canada so far as the land rights were concerned.

VIII. In May, 1903, the International Curtis Marine Turbine Co., the plaintiff herein, was incorporated for the purpose of taking over the rights that the Curtis companies had acquired by virtue of the contracts, heretofore mentioned in Finding VII, and to carry on the business of licensing the manufacture and use of the Curtis turbines for marine purposes throughout the world.

Reporter's Statement of the Case

IX. After the formation of the plaintiff company, it entered into many agreements whereby it granted licenses and the right to issue sublicenses to manufacture, sell, and use the Curtis turbine for marine purposes, and to use any inventions covered by all the Curtis contracts pertaining to steam turbines upon payment of various royalties by the licensees.

X. After acquiring rights from the Curtis Steam Turbine Co. and the International Steam Turbine Co., the plaintiff expended from May, 1903, until January, 1907, in the exploitation and demonstration for marine purposes of steam turbines covered by the Curtis patents, approximately $321,000. Beginning in the year 1907, plaintiff began to license others to manufacture and use steam turbines covered by the Curtis patents for marine purposes and has conducted that practice since that time. It has not since that time manufactured or sold any steam turbines or parts thereof covered by the patents, or any of them, but its whole business has been devoted to licensing others, rendering engineering service to said licensees, and collecting royalties and license fees from such licensees.

XI. Since 1912 plaintiff's property, with the exception of a small amount of office furniture, has consisted entirely of the rights, privileges, licenses, and advantages secured to it by the terms of the contracts above mentioned and the rights and advantages secured to it by the license agreements entered into from time to time with others.

XII. During the years 1916 and 1917 plaintiff's income was derived from royalties and license fees paid to it by the various concerns with which it had entered into license agreements and interest on bank deposits. In 1916 its income from interest received on bank deposits was $1,675.43, and from royalties and license fees $225,887.49. In 1917 its income from bank deposits was $2,170.17 and from royalties and licenses $289,929.87.

XIII. As of March 1, 1913, the contracts hereinbefore mentioned had a minimum life of approximately nine and one-quarter years and were of the value of $1,805,111.

Opinion of the Court

XIV. At the time plaintiff acquired and secured all the rights, privileges, benefits, and advantages secured by the Curtis Steam Turbine Co. and the International Curtis Steam Turbine Co., under and by virtue of said contracts, it issued to said companies 26,671 shares of its capital stock and paid said companies $159,720. Ten thousand of the said shares of stock so issued were returned to plaintiff and 7,996 shares of the stock returned were afterwards sold by plaintiff at $60 per share. Beginning in 1908, plaintiff company began to reduce the par value of its capital stock by distributing among its stockholders the moneys received by it from the licensees with which it had entered into license agreement. In May, 1908, when the first distribution was made, the par value of the stock was reduced to $50 per share. In 1912 the par value was reduced to $10 per share. By January 1, 1917, an additional sum amounting to $7.50 had been distributed among the stockholders and by January 29, 1918, the full amount of $60 had been distributed. At that time the par value of the stock was reduced to $1. The total amount distributed to stockholders by way of return of capital was $1,480,020.

The court decided that plaintiff was entitled to recover $30,053.71, with interest on $2,400, a part thereof, from February 3, 1923, and interest on $27,653.71 from July 23, 1923, to the date of judgment, amounting to $7,045.47, aggregating the sum of $37,099.18.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The revenue act of 1916, 39 Stat. 756, 767, sec. 12, provides for deductions in case of a corporation from the gross amount of its income received within the year from all sources in order to ascertain its net income that is subject to taxation. Among other authorized deductions is "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade." The question is whether the plaintiff was entitled under this provision to the deduction it took in its return but which the commissioner declined to allow. The

plaintiff had a contract (or three several contracts together constituting one) designated as patent license contracts, from which, and the licenses authorized thereby, all of its income for the years in question was derived, except a small amount of income accruing on bank deposits.

The contracts had approximately nine and one-fourth years to run before their expiration, and the plaintiff claims that it should be allowed a deduction from its income of one-ninth of the value of the contracts as of March 1, 1913, or, more accurately as to amount, that it should be allowed a deduction of $120,000, which is less than one-ninth of the value ascertained by the commissioner but is the amount the plaintiff deducted in its tax return for 1917. We think that plaintiff was entitled to the deduction claimed. The contract or contracts were property and furnished the basis of its earnings. Upon their expiration its income would cease. An exhaustion was going on each year. That the reasonable allowance for the exhaustion, wear and tear of property arising out of its employment in the business contemplated by the statute is not to be given a restricted meaning is indicated by the fact that special provision is made in case of oil and gas wells and in case of mines and in case of insurance companies, leaving the generality of application in other cases unimpaired. The deduction, authorized by the act, from gross income, in order to arrive at the taxable income for a given year, is intended to take the place of the reduction during the year of capital assets brought about by the exhaustion or wear and tear of capital assets. The corporate securities issued for the rights secured by the contract would have no value when the contract expires by limitation unless the corporation may set aside from time to time a part of the income sufficient during the years of the life of the contract to take its place when the latter terminates. The plaintiff was entitled to the deduction claimed in its return and is therefore entitled to judgment for the tax improperly assessed, with interest provided in the statute. The view we have taken renders unnecessary a discussion of the question whether the excess-profits tax was to be computed under sec. 209 of the revenue act of 1917.

Judgment should be entered in the sum of $30,053.71, with interest. And it is so ordered.

MOSS, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

FRANCIS L. KOHLMAN, TRUSTEE OF THE ESTATE OF THE FLEISCHMANN CONSTRUCTION COMPANY, v. THE UNITED STATES

[No. C-1327. Decided June 6, 1927]

On the Proofs

Contract; extension of time; waiver of claim; finding of bureau; finality. See *Pawling & Co.* v. *United States*, 60 C. Cls. 699; 273 U. S. 665.

The Reporter's statement of the case:

Mr. Harold J. Pack for the plaintiff. *Messrs. William F. Kimber* and *Wilfred Hearn* were on the brief.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. This action was filed in the name of the Fleischmann Construction Company, but subsequent to the date of filing, to wit, on September 8, 1924, the Fleischmann Construction Company was declared a bankrupt and Francis L. Kohlman was appointed trustee of the bankrupt's estate. On December 3, 1924, the said Francis L. Kohlman, trustee, etc., was, on motion of counsel for plaintiff, substituted as the party plaintiff in this action.

II. During all of the times hereinafter mentioned the Fleischmann Construction Company was a corporation duly organized and existing under the laws of the State of New York and having its office and principal place of business at No. 531 Seventh Avenue, in the city of New York, State of New York.

III. On the fourteenth day of October, 1918, the Fleischmann Construction Company entered into a formal contract with the United States, represented by C. W. Parks, Chief

of the Bureau of Yards & Docks, acting under the direction of the Secretary of the Navy, the same being designated as Contract No. 3425, whereby the Fleischmann Construction Company obligated itself to construct for the United States a naval assembly torpedo plant at Alexandria, Virginia, in accordance with specifications appended to and made a part of the contract. The same consisted of a reinforced concrete assembly shop and storehouse, together with complete hot and cold water, sewer, plumbing, heating, electric lighting and power systems, the cost for such construction named in the contract being $999,750.00. The work to be done under the contract was to be completed in all its parts within one hundred seventy-five (175) calendar days from the date a copy of the contract was delivered to the Fleischmann Construction Company.

A copy of the contract was delivered to contractor November 6, 1918, and the work of construction was due for completion in all its parts on or before April 30, 1919.

Certain changes were made in the plans and specifications during the progress of the work, at the request of the Government, and on May 24, 1919, a supplemental contract was entered into by and between the parties covering the additional work, extending the time for the completion of the work of construction fifty (50) additional days, and allowing additional compensation in the sum of $199,160.07.

A copy of the original contract with the specifications for said work is attached to plaintiff's petition, made a part thereof and marked "Exhibit A," and a copy of the supplemental contract is attached to plaintiff's petition, made a part thereof and marked "Exhibit B," and both the original and supplemental contracts are made a part of these findings by reference.

IV. Contractor began the work of construction on November 7, 1918, the day after the contract was delivered.

V. At the time the contract was entered into the act of Congress limiting the hours of labor on public work had been suspended by Executive order dated March 22, 1917, and the contract contained the following stipulations:

"EIGHT-HOUR LAW.—Attention of bidders is directed to the Executive order dated March 22, 1917, which authorizes

suspension of the limitation of eight hours' work on Government contracts. The contractor will have the right, under the contract, to employ labor in excess of eight hours per day, in view of the present emergency conditions; such employment in excess of eight hours, however, shall be paid for at the rate of not less than time and one-half time."

VI. The Executive order of March 22, 1917, suspending the limitation of eight hours' work on Government contracts was rescinded after the armistice, and on November 15, 1918, plaintiff was ordered by the Bureau of Yards and Docks, Navy Department, to limit all work in the performance of said contract to eight hours per day, four hours on Saturday, and no work whatever on Sunday. The order is as follows:

Subject: Overtime of labor.
Reference: Bureau's letter to public-works officer dated 15th of November, 1918, quoted below.

GENTLEMEN: There is quoted below for your information a letter from the Bureau of Yards & Docks relative to the above subject. Your compliance with the instructions contained therein is requested.

1. You are hereby advised that all overtime of labor in connection with this contract is to be immediately discontinued.

2. No contractor shall employ labor in connection with Government contract in excess of forty-four hours a week; that is, eight hours per day, except Saturday, which will be a four-hour day, and no Sunday work.

3. This order becomes effective immediately.

(Signed) KIRBY SMITH,
By direction of the Chief of Bureau.
(Signed) F. C. NYLAND,
Lieutenant, U. S. N., P. W. Officer.

The supply of laborers in Alexandria, Virginia, where the work was being performed, was insufficient and plaintiff was required to import laborers for the performance of the work. Plaintiff had no difficulty in importing laborers when it was authorized to work them more than eight hours a day; but subsequent to the time that contractor was notified to limit all work in the performance of the contract to eight hours per day, four hours on Saturday, and no work whatever on Sunday, he could not import laborers in sufficient

numbers to enable him to complete the contract on schedule time.

VII. At the time said construction company entered into the contract it expected to employ and would have employed labor in the performance of said contract in excess of eight hours per day, and as much as twenty-four hours per day, if necessary, to complete said buildings within the time required by the contract; and on account of the action of the Government in prohibiting all overtime labor in excess of eight hours per day, four hours on Saturday, and no work whatever on Sunday, contractor was in part prevented from completing said buildings and installing said systems within the required time.

VIII. The Government delayed the contractor in many instances, and as a result of such delays the contractor filed eight separate applications for extensions of time in which to complete the contract. Consideration of the applications for extensions of time were held in abeyance by the contracting officer and under date of June 7, 1920, contractor filed another application for extension of time, which application was a summary of the other eight applications that had previously been made, and requested that the time fixed for completion of the work be extended a total of five hundred eighty-seven (587) days, and filed in support of such request an elaborate statement showing in detail causes of delay complained of and relied upon, which application for extension of time was made to F. C. Nyland, United States Navy, he being the officer in charge of said work. This application for extension of time was considered by Lieutenant W. A. Pollard, who was during the period of construction an assistant to Commander Kirby Smith, the project manager, in the Bureau of Yards and Docks, and by him reported to the Navy Department with the recommendation that the time for the completion of the work be extended one hundred ninety-seven (197) days, as follows:

	Days
Work included in supplemental agreement	50
Suspension of overtime work	99
Delay in inspecting creosote	11
Setting of ordnance machinery	7

	Days
Rodmen and lathers' strike	10
Iron workers and carpenters' strike	14
Carpenters' strike	3
Bricklayers, ironworkers, and rodmen's strike	1
Painters' strike	2
Total	197

Under date of September 25, 1920, the Navy Department approved the recommendation made by Lieutenant Pollard and extended the time for the performance of the contract one hundred and ninety-seven (197) days, which fixed the time for the completion of the work at November 13, 1919.

Lieutenant W. A. Pollard was not the officer in charge of said work, but as the assistant to Commander Kirby Smith he visited the job occasionally. He did not make a personal investigation of the alleged causes of delay, but submitted his recommendation based on information obtained from others.

It does not appear from the evidence just how many days contractor was delayed in the performance of the contract by the acts of the Government.

IX. On June 16, 1919, the Government took possession of and began the occupancy of various parts of said buildings for the purpose of transacting the business of the Ordnance Department and the installation of facilities, and continued to increase said occupancy for such purposes during all of the period thereafter allowed by the contract for the completion of same. Between June 16, 1919, and February 5, 1920, the same being the date that the buildings were completed, the ocupancy of said buildings by the Government for manufacturing purposes was as follows:

Storage building

	Office	Store-room	1st floor
	Per cent	*Per cent*	*Per cent*
June 16	10	0	0
July 16	12	0	0
Aug. 16	37	0	0
Sept. 16	46	1	1
Oct. 16	64	2	2
Nov. 16	80	15	13
Dec. 16	80	15	15
Jan. 16	80	20	20
Feb. 5	80	25	25

Assembly building

	1st floor	2d floor	3d floor	4th floor
	Per cent	*Per cent*	*Per cent*	*Per cent*
June 16	0	0	0	0
July 16	0	0	0	0
Aug. 16	0	0	0	0
Sept. 16	1	1	0	0
Oct. 16	1	1	0	0
Nov. 16	4	2	0	0
Dec. 16	7	3	1	0
Jan. 16	14	7	2	0
Feb. 5	20	10	3	0

Plaintiff did not apply for an extension of time on account of the Government occupying the buildings for manufacturing purposes before the same were completed.

Table showing per cent of occupancy, the per cent of such occupancy for installation facilities, and for manufacture, in the storage and assembly buildings, from June 16, 1919, to February 5, 1920

	Storage building								
	Office			Storeroom			1st floor		
	1	2	3	1	2	3	1	2	3
June 16	20	10	10	10	10	0	0	0	0
July 16	20	8	12	15	15	0	10	10	0
Aug. 16	50	13	37	25	25	0	10	10	0
Sept. 16	60	14	46	30	29	1	20	19	1
Oct. 16	80	16	64	50	48	2	40	38	2
Nov. 16	100	20	80	100	85	15	90	77	13
Dec. 16	100	20	80	100	85	15	100	85	15
Jan. 16	100	20	80	100	80	20	100	80	20
Feb. 5	100	20	80	100	75	25	100	75	25

	Assembly building											
	1st floor			2d floor			3d floor			4th floor		
	1	2	3	1	2	3	1	2	3	1	2	3
June 16	0	0	0	0	0	0	0	0	0	0	0	0
July 16	2	2	0	0	0	0	0	0	0	0	0	0
Aug. 16	5	5	0	2	2	0	0	0	0	0	0	0
Sept. 16	10	9	1	5	4	1	2	2	0	0	0	0
Oct. 16	15	14	1	8	7	1	2	2	0	0	0	0
Nov. 16	30	26	4	15	13	2	4	4	0	0	0	0
Dec. 16	50	43	7	25	22	3	6	5	1	0	0	0
Jan. 16	70	56	14	35	28	7	8	6	2	0	0	0
Feb. 5	80	60	20	40	30	10	10	7	3	0	0	0

NOTES.—Column 1, per cent of occupancy; column 2, per cent of occupancy for installation facilities; column 3, per cent of occupancy for manufacture.

X. After allowing extensions of time to November 13, 1919, the work was finally completed on February 5, 1920, or eighty-four (84) days after the final extension date, where-

upon the Navy Department deducted from the amounts otherwise due the plaintiff liquidated damages at the rate of $500.00 per day, or a total of $42,000.00, together with the sum of $1,359.49, the same being two per centum of the final claim.

XI. Under date of September 24, 1920, plaintiff company executed the following qualified release:

"Under Contract No. 3425, October 14, 1918, of the Fleischmann Construction Company, for naval torpedo assembly plant at Alexandria, Virginia, and Supplemental Contract No. 3425X, for work on same plant.

"Whereas the contract dated October 14, 1918, by and between the Fleischmann Construction Company, a corporation of the State of New York, party of the first part, hereinafter called the contractor, and the United States, party of the second part, hereinafter called the Government, for the construction and completion of a naval torpedo assembly plant at Alexandria, Virginia, and supplemental contract of May 24, 1919, between the same parties for additional work on said plant, contemplates that final payment therefor shall not be made until the contractor shall have executed and delivered a final release of claims in such form and containing such provisions as shall be approved by the Navy Department of claims against the Government arising under or by virtue of said contracts; and

"Whereas the work under said contracts has been completed and accepted; and

"Whereas the contractor desires to be paid the balance admitted to be payable for said work, and at the same time to reserve its claim for the sum of $42,000 deducted by the Government from the contract price as liquidated damages for delay in the completion of said work, as well also as certain other claims and demands amounting to $25,974.62 for alleged extra and additional work and costs, and the Government is willing to pay said balance and permit the excepting of said claims from the operation of the release of claims contemplated by said contract, provided it receives adequate consideration therefor, which consideration it has fixed at two per centum of the amount of said claims and damages, namely, $1,359.49.

"Now, therefore, in consideration of the premises, and for and in consideration of the sum of sixty thousand seven hundred thirty-eight 73/100 ($60,738.73), lawful money of the United States (said sum being the balance admitted by the Government to be payable for said work, namely,

Opinion of the Court

$62,098.22, less the sum of $1,359.49 deducted with the consent, hereby given, of the contractor as consideration moving to the Government for payment of said sum of $60,738.73, coupled with the exception from the operation of this release of claims of said claim for refund of liquidated damages and additional compensation), to the contractor in hand paid by the Government, the receipt of which is hereby acknowledged, the contractor does hereby for itself and its successors and assigns and its legal representatives, remise, release, and forever discharge the Government of and from any and all claims and demands whatsoever in law and in equity that the contractor has or may have under or by virtue of said contracts, expressly excepting, however, and excepting only, its said claim for refund of the sum of $42,000, deducted by the Government as liquidated damages, and all said claims for alleged extra and additional wages and costs, not exceeding in all the sum of $67,974.62, which said claims the contractor hereby expressly reserves. It is, however, distinctly understood that nothing in this release shall operate as, or be construed to be, a recognition or admission by the Government of the validity of said reserved claims or any part thereof.

"In witness whereof the contractor has hereunto set its hand and seal this 24th day of September, 1920.

"In presence of:

"FLEISCHMANN CONSTRUCTION COMPANY,
"LEON FLEISCHMANN, *President*.

"Attest:

"G. J. FLEISCHMANN, *Treasurer*."

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

This case apparently involves no lengthy discussion. It falls within the principles long since and well established by this and the Supreme Court. Plaintiff's cause of action rests exclusively upon the issue of delays. The Fleischmann Construction Company, for whom a trustee in bankruptcy sues, on October 14, 1918, entered into a written contract with the Government, known as Contract No. 3425, to construct a naval assembly plant at Alexandria, Virginia. The buildings were to be completed within 175 days from November 6, 1918. On May 24, 1919, subsequent to the original completion date, a supplemental agreement was executed by the

parties increasing the compensation of the contractor providing for additional work and extending the time of completion for 50 days. During the course of performance interferences were ascribed to the Government and claims for additional time were preferred by the contractor because of the same. The Government in its final consideration of the contractor's claims for extension allowed a total of 197 days as due to causes for which the Government was responsible. This allowance left 84 days of delay for which the contractor was held responsible, and liquidated damages at the rate of $500 per day were assessed against the contractor. It is for this amount of $42,000 this suit is brought.

Paragraph 12 of the contract provided as follows:

> "*Extension of time.*—For causes of the character hereinafter enumerated extensions of time for the completion of the work may be allowed. Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for consideration and for such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated, shall be deemed and construed as a waiver of all claims and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding."

The plaintiff did not observe the terms and conditions of this provision, although the Government did consider the claims irrespective of this fact. Nevertheless, the paragraph expressly makes the decision of the Navy Department, Bureau of Yards and Docks, conclusive and binding. Therefore, the case falls within the case of *Pawling & Co.* v. *United States*, 60 C. Cls. 699; certiorari denied by Supreme Court March 7, 1927, 273 U. S. 665. See also *Union Insulating & Construction Co.* v. *United States*, 59 C. Cls. 582.

Reporter's Statement of the Case

Plaintiff presents a vigorous contention that the partial occupancy of the buildings by the Government during the course of construction constitutes a waiver of the liquidated damage clause of the contract. Several State cases are cited to sustain the argument. We think, however, the cases are inapplicable and the contention untenable, at any rate so far as this contract is concerned. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105.

While there is no evidence of actual damages, and in many respects the case seems a hard one, nevertheless we feel confident that under the decisions the plaintiff may not recover. The petition will be dismissed. It is so ordered.

MOSS, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

JOHN J. MITCHELL, AUGUSTINE L. HUMES, AND ILLINOIS MERCHANTS TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF DELLORA R. GATES, DECEASED, v. THE UNITED STATES[1]

[No. E-348. Decided June 6, 1927]

On the Proofs

Estate transfer tax; deductions from gross estate; bequest for charitable purpose; contingency.—Where the right to a bequest for charitable purposes is liable to be defeated through the attainment of a certain age by the principal beneficiary under the residuary clause of the will, the amount thereof is not deductible from the gross estate of the testator under the revenue act of 1918.

The Reporter's statement of the case:

Mr. Milward W. Martin for the plaintiffs. *Mr. A. L. Humes* and *Humes, Buck & Smith* were on the briefs.

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[1] Writ of certiorari granted.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs, John J. Mitchell, residing in the city of Chicago, county of Cook, and State of Illinois, Augustine L. Humes, residing in the borough of Spring Lake, county of Monmouth, and State of New Jersey, and Illinois Merchants Trust Co., a corporation organized and existing under the laws of the State of Illinois and having its principal office and place of business in the city of Chicago, county of Cook, and State of Illinois, all citizens of the United States, are executors of the last will and testament of Dellora R. Gates, deceased.

II. Dellora R. Gates was a citizen of the United States and resided in the city of Port Arthur, county of Jefferson, State of Texas, and died in the city of New York, county and State of New York, on the 28th day of November, 1918.

III. The said Dellora R. Gates died leaving a last will and testatment with codicil thereto, which will and codicil were duly probated in the county court of Jefferson County, State of Texas, on the 6th day of January, 1919. A true copy of said last will and testament and codicil thereto is annexed to the petition herein marked "Exhibit A," and is made a part hereof and letters testamentary thereon were duly issued to John J. Mitchell and Augustine L. Humes, and Charles E. Herrmann, a citizen of the United States and late a resident of the village of Scarsdale, county of Westchester, and State of New York, by said county court on the said 6th day of January, 1919, and the said John J. Mitchell, Augustine L. Humes, and Charles E. Herrmann thereupon duly qualified as executors of said last will and testament. Said letters testamentary to John J. Mitchell and Augustine L. Humes still remain in full force and effect and John J. Mitchell and Augustine L. Humes have been continuously executors of the said last will and testament from the time of the issuance of said letters testamentary down to the time of the filing of the petition.

Reporter's Statement of the Case

IV. The said Charles E. Herrmann died on the 20th day of December, 1924. Letters testamentary were duly issued by the county court of Jefferson County, State of Texas, to the Illinois Merchants Trust Co., as one of the executors of the said last will and testament in the place and stead of Charles E. Herrmann, deceased, on the 4th day of February, 1925. Said letters testamentary still remain in full force and effect and the Illinois Merchants Trust Co. has been continuously an executor of said last will and testament from the time of the issuance of said letters testamentary down to the time of the filing of the petition herein.

V. On or about the 28th day of November, 1919, as required by law, but under protest, the said John J. Mitchell, Augustine L. Humes, and Charles E. Herrmann, executors as aforesaid, made and filed with the collector of internal revenue at Austin, Tex., the collector of internal revenue for the district in which Port Arthur, Tex., was at all times situated a "Return for estate tax" in the form prescribed by the Commissioner of Internal Revenue under the act of September 8, 1916, known as the revenue act of 1916, as amended by the acts of March 3, 1917, and October 3, 1917, stating the assets of the said estate and the deductions claimed therefrom showing an amount of estate tax payable by the said estate in the sum of $2,927,762.64. Said sum was thereafter fully paid to the collector of internal revenue at Austin, Tex., $1,000,000 thereof being paid under protest on the 25th day of February, 1920, and the remainder, amounting to $1,927,762.64, being paid under protest on the 27th day of May, 1920. Thereafter and on or about the 8th day of April, 1924, the sum of $12,657.21 of estate tax paid as aforesaid, together with $255.23 of interest thereon, was refunded by the Commissioner of Internal Revenue in pursuance of a claim for refund filed by the said executors. Said claim for refund was based on administration expenses and debts of the said Dellora R. Gates not paid at the time of the filing of the said "Return for estate tax" and did not include the amount claimed in this suit or any part thereof. Thereafter and on or about the 13th day of April, 1925, the sum of $230,358.99 of estate tax paid as aforesaid,

together with $66,911.41 of interest thereon, was refunded by the Commissioner of Internal Revenue in pursuance of three certain claims for refund filed by the said executors. Said three claims for refund were based on funeral expenses and debts of the decedent not theretofore allowed by the Commissioner of Internal Revenue and on the overvaluation of certain securities of Moose Mountain (Ltd.), an Ontario corporation, included in the said estate, and did not include the amount claimed in this suit or any part thereof.

VI. In and by the said will and codicil the said Dellora R. Gates, after making certain money bequests to legatees and certain specific bequests and devises and bequests and devises of certain life estates in and certain contingent gifts of the residue, bequeathed and devised all the rest and residue of the property to the executors and trustees named in the will, in trust one-half for the erection, creation, maintenance, and endowment of an old people's home, and one-half for the erection, creation, maintenance, and endowment of a children's home, all as more fully set forth in Subdivision III of article 51 of said will.

VII. Dellora F. Angell, the niece of the testatrix, referred to in article 51 of said will, was born on December 23, 1902, and was living on November 28, 1918, at the time of the death of the said testatrix, but unmarried and had never been married. Edward J. Baker, the brother of the testatrix, referred to in article 51 of the said will, was born on September 30, 1868, and was living on said November 28, 1918, at the time of the death of said testatrix.

VIII. Under and by the estate-tax regulations promulgated by the Secretary of the Treasury in effect both at the time of the death of the testatrix, Dellora R. Gates, and at the time when the said "Return for estate tax" was made and filed, and in particular article 56 of the said regulations as construed by the Commissioner of Internal Revenue, the said executors were not permitted to make a deduction for the said charitable gifts prescribed in Finding VII hereof in computing the net estate subject to tax in the said "Return for estate tax" and made no such deduction because of the penalties and forfeitures threatened by the Commis-

sioner of Internal Revenue. Nevertheless in a protest accompanying the said "Return for estate tax" and again in a written protest accompanying each of said payments of the tax the said executors expressly and specifically claimed the right to make such deduction and protested against the refusal of the Commissioner of Internal Revenue and the Secretary of the Treasury to allow such deduction.

IX. The value of the residuary estate bequeathed and devised by article 51 of the said will was $11,783,072.30, as computed in accordance with the value of the estate as determined by the Commissioner of Internal Revenue upon the audit by him of the said "Return for estate tax" and upon the determination of the claims for refund allowed as aforesaid.

X. If the value of the gift of the residue in remainder under Subdivision III of article 51 of said will at the time of the death of said testatrix was $482,034 and had been allowed as a deduction in computing the estate tax payable with respect to the said estate, said estate tax would have been reduced by the sum of $120,508.50.

XI. On November 24, 1923, said executors duly filed an application with the collector of internal revenue at Austin, Tex., praying for the refund of the sum of $120,508.50 or such greater amount as should be legally refundable on all the grounds set forth in the petition. Said application for refund was in all respects complete, regular, and in due form, but was denied and rejected by the Commissioner of Internal Revenue, who still denies and refuses to pay to plaintiffs the money asked for and demanded in said application or any part thereof.

XII. The said sum of $2,927,762.64 so paid by said executors as and for a tax as aforesaid was received and is still retained by the United States, except that the sums of $12,657.21 and $230,358.99 have been refunded as aforesaid.

XIII. The plaintiffs in their capacity as executors of the said will are the sole owners of the claim sued upon herein and no assignment or transfer of said claim or any part thereof or any interest therein has been made.

Memorandum by the Court

XIV. No action upon this claim other than herein set forth has been taken before Congress or any other of the departments of the Government or in any court other than the petition filed in this court.

In addition to the foregoing, the court finds that a copy of the will of the testatrix is attached to the petition herein.

The court decided that plaintiffs were not entitled to recover.

MEMORANDUM BY CHIEF JUSTICE CAMPBELL

The considerations upon which the court bases its judgment are as follows:

The question for decision is whether, under the undisputed facts, the executors of the will, in the ascertainment of the value of the net estate, may deduct from the value of the gross estate a bequest to trustees for charitable purposes where such bequest is upon a contingency that may never happen.

(1) The revenue act of 1918, 40 Stat. 1098, sec. 403, authorizing deductions from the gross estate of the amount of all bequests or gifts to a trustee, exclusively for religious or charitable purposes, contemplates bequests or gifts intended to take effect (1) upon the testator's death, or (2) upon the happening of an event that will certainly occur.

(2) If the contingency, upon which the bequest is to go to the charitable purpose, be such that the bequest or gift may never become effective in possession or enjoyment the statute does not authorize a deduction of the amount, or its ascertained value, from the gross estate.

(3) In the instant case any right to the supposed charitable bequest is liable to be defeated if and when the niece, made the principal beneficiary under the residuary clause of the will, attains forty years of age. In other words, the supposed bequest to charity may never ripen into possession or enjoyment. It is, therefore, too remote, contingent, and uncertain to be taken into account in determining the value of the net estate for the purposes of the estate tax under the revenue act of 1918.

MOSS, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

CENTRAL UNION TRUST COMPANY OF NEW YORK, GUARANTY TRUST COMPANY OF NEW YORK, FREDERIC A. JUILLIARD, CHESTER A. BRAMAN, AND ROBERT WESTAWAY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF AUGUSTUS D. JUILLIARD, DECEASED, v. THE UNITED STATES [1]

[No. E-41. Decided June 6, 1927]

On the Proofs

Income tax; income of decedent dying within taxable year; executor's return.—The income received by a testator during the taxable year in which he died, is his income for the entire year, is returnable by his executor, and is taxable as income for one year.

Same; State inheritance tax.—In the assessment of the Federal income tax a State inheritance tax is not deductible from the gross income of the decedent, received by him during the taxable year in which he died.

The Reporter's statement of the case:

Mr. John M. Perry for the plaintiffs. *Messrs. A. M. Lewis* and *Stewart M. Seymour*, and *Larkin, Rathbone & Perry* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On the 25th day of April, 1919, Augustus D. Juilliard died a resident of the county of Orange, State of New York, leaving a last will and testament which was, on the 25th day of September, 1919, duly admitted to probate by the surrogate of the county of Orange, and on the 25th day of September, 1919, letters testamentary were issued to plaintiffs as executors, who ever since have been and still are the duly qualified and acting executors of said estate.

II. On the 15th day of March, 1920, plaintiffs filed in the office of the collector of internal revenue for the second dis-

[1] Writ of certiorari denied.

trict of New York a return of income on a receipt and disbursement basis received by the decedent in his lifetime during the period from the 1st day of January, 1919, to the 25th day of April, 1919, and they also at the same time filed a return on a receipt and disbursement basis of income received by them as executors from the 25th day of April, 1919 (the date of death of decedent), to the 31st day of December, 1919, which returns showed net incomes as follows: For the period commencing January 1 and ending April 25, 1919, $336,710.96 subject to normal tax and $934,010.96 subject to surtax; for the period commencing April 25 and ending December 31, 1919, $69,095.81 subject to normal tax and $376,438.32 subject to surtax; and on the 29th day of March, 1920, the said executors paid to the collector of internal revenue for the second district of New York the sum of $141,993.47, and on the 15th day of June, 1920, the said executors paid to the said collector the sum of $141,-993.47, and on the 16th day of September, 1920, the said executors paid to the said collector the sum of $141,993.47, and on the 15th day of December, 1920, the said executors paid to the said collector the sum of $141,993.48, the said payments being in the aggregate the sum of $567,973.89, the total amount of tax for the first period above referred to, i. e., from January 1, 1919, to April 25, 1919, as reflected by the return for this period.

III. The said returns were not false or fraudulent and did not contain any willful understatements or undervaluations.

IV. In the preparation of the returns for the periods aforesaid plaintiffs did not deduct from the gross income as reflected by the return for the period commencing January 1 and ending April 25, 1919, the tax paid by them to the United States of America, pursuant to Title IV of the revenue act of 1918, commonly known as the Federal estate tax, amounting to $888,614.14, and did not deduct from the gross income as reflected by the return covering the period commencing April 25 and ending December 31, 1919, the tax paid by them to the comptroller of the State of New York, pursuant to Article X of the tax law of that State, commonly

known as the transfer tax, amounting to $425,481.57, both of which taxes were paid as follows, to wit: The estate tax to the United States of America on the 22d day of October, 1920, and the transfer tax to the State of New York, $400,-000, on the 23d day of October, 1919, and the balance of $25,481.57 on the 13th day of January, 1921.

V. On July 9, 1921, plaintiffs filed in the office of the collector of internal revenue for the second district of New York a claim for a refund in the said sum of $567,973.89, which sum is in excess of any income, war-profits, or excess-profits taxes or any installment thereof due the United States from the plaintiffs under any other return.

VI. More than six months have elapsed since the filing of said claim for refund, but the Commissioner of Internal Revenue has not rendered a decision thereon. No part of the sums paid by the plaintiffs as aforesaid as income taxes due from the decedent for the period beginning January 1, 1919, and ending April 25, 1919, has been refunded. There is now pending in this court an action in which the Central Union Trust Company, etc., is plaintiff against the United States, being No. D–1112, in which action a deduction of $400,000 from the gross income of the estate for the period beginning April 25, 1919, and ending December 31, 1919, is claimed on account of the New York inheritance taxes mentioned in this action. There is pending in this court an action in which the Central Union Trust Company of New York, etc., is plaintiff against the United States, being No. E–161, to recover the sum of $101,012.18 Federal estate tax, which amount was assessed and paid in addition to the Federal estate tax of $888,614.14 claimed in this action as a deduction from the gross income of the decedent for the period beginning January 1, 1919, and ending December 31, 1919.

The court decided that plaintiffs were not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

Augustus D. Juilliard died on April 25, 1919, leaving a last will and testament, which was duly probated, and on

September 25, 1919, letters testamentary were duly issued to plaintiffs herein as executors, who thereafter and during the period involved in this action were duly qualified and acting executors of decedent's estate.

Between the 1st day of January, 1919, and the date of decedent's death, April 25, 1919, decedent received a net income of $336,710.96 subject to normal tax, and a net income of $934,010.96 subject to surtax.

On March 15, 1920, plaintiffs, as executors, filed a return showing the income above stated disclosing an income tax amounting to $567,973.89, which tax was paid in four equal installments. Thereafter plaintiffs filed with the Commissioner of Internal Revenue a claim for the refund of the entire tax. The commissioner failing to take any action on said claim within six months from the filing of same plaintiffs instituted this action for the recovery of said amount. Plaintiffs also filed on the same date a tax return showing the net income of the estate of Juilliard from the date of his death, April 25, 1919, to December 31, 1919, amounting to $69,095.81 subject to normal tax and $376,-438.32 subject to surtax, the tax on which, $190,930.80, was paid by plaintiffs. In reference to this item it appears from an agreed statement of facts herein that there is now pending in this court an action, D–1112, by which plaintiffs assert a claim against the Government for the deduction of $400,000 from the gross income of decedent's estate for the period beginning April 25, 1919, and ending December 31, 1919, on account of the New York inheritance taxes paid by plaintiffs. It further appears that at the time of the filing of the agreed statement of facts there was also pending another action by plaintiffs against the Government, E–161, involving a claim for refund growing out of the payment of a certain item of Federal estate tax. This action has since been disposed of by judgment of this court. At any rate the present action relates only to the claim for refund of the amount paid as income tax on the income accruing during the life of plaintiffs' decedent, $567,973.89.

The question involved in this case is controlled by the revenue act of 1918, 40 Stat. 1057, the applicable portions of which are as follows:

Opinion of the Court

"SEC. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates. [Here follow the rates.]

"SEC. 211. (a) That, in lieu of the taxes imposed by subdivision (b) of section 1 of the Revenue Act of 1916, and by section 2 of the Revenue Act of 1917, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax equal to the sum of the following." [Here follow the rates.]

"SEC. 214. (a) That in computing net income there shall be allowed as deductions:

"(3) Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits, and excess-profits taxes; or (b) by the authority of any of its possessions, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (c) by the authority of any State or Territory, or any county, school district, municipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed; or (d) in the case of a citizen or resident of the United States, by the authority of any foreign country, except the amount of income, war-profits, and excess-profits taxes allowed as a credit under section 222; or (e) in the case of a nonresident alien individual, by the authority of any foreign country (except income, war-profits, and excess-profits taxes, and taxes assessed against local benefits of a kind tending to increase the value of the property assessed), upon property or business."

Plaintiffs contend, first, that there was no provision in the revenue act of 1918 which authorized a tax upon the income received by plaintiffs' decedent from January 1, 1919, to the date of his death, April 25, 1919, and that said act contained no provision which could be construed to require the filing of a return or the payment of a tax for any period less than a taxable year of twelve months. Plaintiffs' second point is, that if plaintiffs were liable for the payment of income tax for the period from January 1, 1919, to the date of the death of plaintiffs' decedent, April 25, 1919, they were entitled to deduct from the gross income for that period, in determining the net income, the amount of inheritance taxes paid to the

State of New York during the year 1919, and not theretofore deducted in computing the income tax of decedent's estate during the period of administration.

The court is unable to agree with plaintiffs' contention on either point. It is inconceivable that Congress intended under the revenue act of 1918 or under any other revenue act, to relieve from taxation the income received by a taxpayer for the period between the first of the year and ending with the death of the taxpayer dying within the taxable year. The statute under consideration provides that "there shall be levied, collected, and paid *for each taxable year* upon the net income of *every individual*, a normal tax at the following rates * * *." The same language is used concerning the surtax. The fact that the income in this case was imposed for a period of less than a taxable year does not affect the statutory requirement that "there shall be levied, collected, and paid *for each taxable year* * * *." This income was received by plaintiffs' decedent from January 1 to April 25, 1919. It constituted the entire income received by Juilliard for the full *taxable year*, and for the tax on that income he was liable. His death, however, prevented him from making a return and paying the tax at the time the tax became due. The Government was still entitled to the tax on that income. Although the return filed by the executor for the income of the decedent was for a period which was less than the taxable year, it was, nevertheless, on a yearly basis and constituted the entire income received by Juilliard for the *full taxable year*. In order that the Government might receive the tax on all the income of a decedent for the entire taxable year within which the death occurs, that which was received during the life of the decedent, as well as the income received by the estate after the death, the law requires a return to be made by the executor or representative under the provisions of section 225 of the 1918 act, the pertinent portions of which are as follows: "every fiduciary * * * shall make under oath a return for the *individual*, estate or trust for which he acts * * * stating specifically the items of the gross income and the deductions and credits allowed by this title * * *," and, further, * * * "fiduciaries required to make returns

under this act shall be subject to all the provisions of this act which apply to *individuals*." Section 200 of the act provides "that when used in this title * * * the term 'fiduciary' means a guardian, trustee, *executor* * * * or any person acting in any fiduciary capacity for any person, trust or estate."

For the reasons stated herein the court must hold that the return in this case, and the collection of the tax thereunder was strictly in accord with the intention of Congress as expressed by the appropriate statutes on the subject.

On the second contention, that if plaintiffs were liable for the tax for the period from January 1, 1919, to April 25, 1919, they were entitled to deduct from the gross income the amount of inheritance State taxes paid to the State of New York during the year 1919.

This question is governed by section 214 (a) (3) of the act of 1918, which provides that in computing net income for the purpose of the tax there shall be allowed as deductions the taxes paid or accrued within the taxable year imposed by the authorities of the United States or of any State. In the case of *United States* v. *Mitchell*, 271 U. S. 12, it is declared that "paid" means "paid or accrued" and that the phrase "paid or accrued" shall be construed, according to the method of accounting, upon the basis on which the net income is computed. The return in that case showed that the computations was made on the basis of income actually received in 1919, which indicated, said the court, that the accounts were kept on the basis of actual receipts and disbursements. The executors maintained that the estate tax in that case, accruing in 1919 and *paid in 1920*, was deductible from the gross income actually received in 1919 in determining the net income of the estate. This contention was rejected by the court on the ground that the tax in question was not paid *within the taxable year*. The tax returns in the case under discussion were likewise made on a receipt and disbursement basis of income. It appears that $25,481.50 of the amount paid by plaintiffs on account of the New York inheritance tax was not paid until the year 1921. Under the authority of the principle above announced it is clear that this amount is not an allowable deduction.

Syllabus

The balance of the State inheritance tax, $23,561.75, was paid in 1919. The court, however, has reached the conclusion that under the authority of the decisions in *Keith* v. *Johnson*, 271 U. S. 1, and *Catherwood* v. *United States*, 291 Fed. 560, no part of the State inheritance tax constitutes an allowable deduction from the income of decedent. Inasmuch as an action is now pending in this court by plaintiffs claiming a deduction of $400,000 from the gross income of the estate of decedent for the period from April 25, 1919, to December 31, 1919, on account of said State inheritance tax, and that the cases cited involve chiefly a consideration of the same questions presented in the pending suit just mentioned, it does not seem desirable at this time to discuss those decisions. It is deemed sufficient to state that the principles therein announced afford ample support for the theory that the State inheritance tax is not an allowable deduction from the income of the decedent.

It is therefore adjudged that the plaintiffs' petition herein be and the same is dismissed.

HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

NATIONAL LAUNDRY COMPANY v. THE UNITED STATES

[No. C-35. Decided June 6, 1927]

On the Proofs

Contract; laundry work; amount not specified; abandonment of work; loss of profits.—Prior to signing an exclusive contract of laundry work at an Army cantonment the contractor was assured by the contracting officer that there would be a certain amount of business, but the contract as drawn did not guarantee any amount. After part performance the contractor demanded and was refused payment of a certain sum which it claimed to be due, and thereupon abandoned the work. *Held*, that it could not recover profits lost by reason of the abandonment.

Reporter's Statement of the Case

Same; expense due to Government's delay.—Where, under the circumstances recited, the Government delayed in furnishing a central receiving and distributing station for the laundry, provided for by the contract, obliging the contractor to employ extra men and facilities, it can recover the expense thereof.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiff.

Mr. W. F. Norris, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation and was created as such under the laws of the State of Kentucky to engage in the laundry business at Government camps and other places.

II. On September 4, 1917, the plaintiff entered into a contract with the United States Government, acting through Lieutenant Colonel Hugh J. Gallagher, Quartermaster Corps, U. S. A., which contract is filed as "Exhibit A" to the petition and made a part hereof by reference, under which the contractor agreed to do all the laundry work of the Government and of the officers and soldiers at the National Army Cantonment, Atlanta, Georgia, at prices fixed therein, and the Government was to provide a suitable building for a central receiving and distributing station, to be suitably lighted and heated by the Government.

III. Prior to the execution of the contract the plaintiff was informed by the contracting officer that it would have $12,000 worth of business a week. When the contract came to be executed no guaranty of the amount of work per week was inserted in the contract, nor did the plaintiff require such a guaranty. The secretary of the plaintiff testified: "They left the guaranty out of the contract, and we did not put in anything about the facilities we should have."

IV. The plaintiff did not furnish facilities to do the laundry work, excepting to provide four trucks to transfer the laundry to and from the Atlanta laundries under an agreement with the plaintiff.

V. On February 15, 1918, the commanding officers of the cantonment, being dissatisfied with the work of the plaintiff, withdrew from it the base hospital laundry work, sending the same to other laundries. Subsequently the Board of Contract Adjustment allowed a claim of the plaintiff for this work to the amount of $1,204.53. Whether this claim was paid does not appear. However, the plaintiff makes no claim for it in its petition. At times outside parties entered the cantonment and procured laundry work. This practice was stopped by the officers of the cantonment when it was called to their attention.

VI. On March 4, 1918, the plaintiff notified the contracting officer that it would refuse to perform the contract unless it was paid the sum of $15,428, which it claimed was due it for services theretofore performed. This the contracting officer refused to do. The plaintiff thereupon abandoned the work, and did not thereafter undertake to perform its contract.

VII. One Colonel Shelby, an officer of the United States, insisted that the plaintiff should maintain facilities that would do a volume of laundry work equal to $12,000 or more per week, and refused to consent to plaintiff reducing these facilities. This officer was not authorized under the contract to make such a demand, nor did the contract require the plaintiff to maintain facilities beyond which were necessary to perform the work which was given it to do.

VIII. The Government delayed some two months in providing a suitable building for a central receiving and distributing station properly lighted and heated as provided by paragraph 3 of the contract. By reason of this delay the plaintiff was obliged to employ extra men and to provide for facilities which were not contemplated by the contract and was damaged in the sum of $2,620.

The court decided that plaintiff was entitled to recover, in part.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiff against the United States for the sum of $67,934.63.

Opinion of the Court

On September 4, 1917, the plaintiff entered into a written contract with the United States whereby it agreed to furnish the laundry facilities to properly handle all of the laundry work for the United States Government and the officers and soldiers at the National Army cantonment at Atlanta, Georgia, and to do said work to the satisfaction of the commanding officer of said cantonment at rates specified in a schedule annexed to the contract.

The United States agreed on its part to provide a suitable building with a floor space of not less than 7,500 square feet for a central receiving and distributing station within the cantonment reservation, which was to have been suitably lighted and heated by the Government.

This suit is based upon a claim by the plaintiff that prior to the execution of the contract it was informed by the contracting officer that there would be $12,000 worth of business a week. The amount of work to be performed per week was discussed between the plaintiff and the contracting officer, but when the contract was executed by the parties it contained no guaranty of how much business the plaintiff was to receive. It is not contended by the plaintiff that it even requested the inclusion in the contract of any obligation on the part of the Government to furnish any given amount of work. The United States knew no more about the probable volume of work than did the plaintiff. Their opportunities for information on this matter were equal. It appears that the secretary for the plaintiff, one of those who signed the contract and who was most active in procuring it, stated: "They left the guaranty out of the contract, and we did not put in anything about the facilities we should have." It would seem that the omission of any guaranty on the part of the United States of a particular volume of work was traded for the omission of any obligation on the part of the contractor to provide any particular facilities.

As a matter of fact the Government did not guarantee any particular volume of work and the contractor did not furnish the facilities, the work being done by certain Atlanta laundries under an agreement with the plaintiff.

The plaintiff contends that it was forced by one Colonel Shelby to abandon profitable contracts which it had made

with certain laundries in Atlanta, and that the said Shelby demanded that arrangements should be made for a volume of business of $12,000 per week. The contract in this case contains no provision whereby Colonel Shelby had any power to determine what facilities the plaintiff should provide. The plaintiff had under the contract to provide adequate facilities, and it was the judge as to what facilities were adequate for the performance of its contract. If the plaintiff chose to accept the opinion of Colonel Shelby it assumed the risk, and it can not expect the United States to compensate it for its own mistake.

While the item of the demand which asserts a claim against certain officers and men may be just as against them, it is not enforceable against the United States. The contract contains no provision which makes the United States responsible for these claims. The item of excess cost of bond is not allowable. The plaintiff contracted to give a bond in the penal sum of $25,000, conditioned upon its faithful performance of the contract. There is no provision in the contract which in any way binds the United States to pay the premium on this bond. The item of $42,197.69 loss of profits is not allowable. The plaintiff did not perform its contract but voluntarily abandoned it.

It appears that the United States delayed for two months to provide a suitable building for a central receiving and distributing station as provided for in paragraph 3 of the contract. It also appears that by reason of this delay the plaintiff was obliged to employ extra men and facilities and expended the sum of $2,620 over and above what it would have had to expend had the United States not delayed in performing its contract. We are of opinion that the plaintiff is entitled to recover the sum so expended, and have directed that judgment shall be entered in accordance with this opinion.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

CAMBRIDGE LOAN AND BUILDING COMPANY v. THE UNITED STATES

[No. D–1083. Decided June 6, 1927]

On the Proofs

Income tax; building and loan associations; exemption; revenue act of 1918.—The words "without capital stock organized and operated for mutual purposes and without profit," in section 231 (4) of the revenue act of 1918, refer to cooperative banks and not to domestic building and loan associations, and under the said section such associations, organized and doing business under the laws of the State creating them, are exempt from the income tax.

Same; definition; revenue act of 1921.—A building and loan association, making substantially all of its loans to its own members on and after passage of the revenue act of 1921, is, under section 231 (4) thereof, exempt from the income tax.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff during the calendar years 1918 to 1923, inclusive, was a corporation organized in the year 1885 under and by virtue of the laws of the State of Ohio for the purpose of raising money to be loaned to its members and others, and for such other purposes as were authorized by law; was authorized to issue capital stock not in excess of $1,500,000, and had its place of business in the city of Cambridge in said State. The par value of each share was $50.

II. Ever since the creation of the office of superintendent of building and loan associations under the laws of the State of Ohio in the year 1891 the plaintiff has annually filed its report to the said superintendent as a building and loan association organized, created and doing business as

such under the laws of the State of Ohio; and the plaintiff was, as such building and loan association, annually inspected by the said superintendent in the course of his official duties.

III. With the exception of an investment of $5,000 in hotel bonds, which was disapproved by the Department of Building and Loan Associations of the State of Ohio and afterwards disposed of, the plaintiff, during the calendar years 1918 and 1923, inclusive, invested its funds in the manner prescribed and permitted under the laws of the State of Ohio for the investment of funds of building and loan associations, reported its said investments annually to the superintendent of building and loan associations of the said State, and received a report each year from the said department upon the conduct of its business.

IV. Section I of Article V of plaintiff's constitution provided as follows:

"Any one, upon subscribing for, or in any manner becoming entitled to, or the owner of any part of the capital stock of this company shall be deemed a member thereof and a stockholder therein to the extent of the balance of his credits of record on account of said stock."

V. During the calendar years 1918 to 1923, inclusive, the net profits of the plaintiff, except that part set aside as a reserve fund under the laws of the State of Ohio and that part retained as undivided profits, were distributed semiannually in dividends at the rate of 5.7% for the year to the members of the plaintiff company only and at the said rate to all members of all classes.

VI. The money raised by the plaintiff during the calendar years 1918 to 1923, inclusive, for the purposes of its incorporation was principally from payments on stock, from deposits by nonmembers, and from interest on moneys temporarily deposited by it in bank or loaned to building and loan associations, and the extent of all such transactions was reported to the superintendent of building and loan associations of the State of Ohio in the aforesaid annual reports.

Deposits by nonmembers were evidenced by certificates of deposit or by pass books, could be withdrawn upon notice,

and plaintiff paid interest thereon, on sums deposited less than six months, 3%; more than six months and less than a year, 4%; and a year, 5%.

VII. The plaintiff's assets and liabilities at the end of each calendar year, 1918 to 1923, inclusive, were as follows:

ASSETS

	1918	1919	1920
1. Cash on hand	$55,868.16	$28,612.76	$52,669.60
2. Loans on mortgage security	737,150.61	866,834.40	1,111,127.09
3. Loans on stock certificates or pass-book security	8,013.50	8,698.22	9,842.50
4. Loans on other security	17,975.00	34,020.00	27,546.42
5. Furniture and fixtures	200.00	245.00	----------
6. Real estate sold on contract	750.00	750.00	750.00
7. Real estate—office building	22,500.00	22,500.00	22,500.00
8. Due from borrowers for insurance and taxes	230.12	309.14	267.19
9. Bonds	16,497.50	10,762.98	25,767.46
10. Deposits in other building and loan associations	98,500.00	147,000.00	95,000.00
11. Deposits in other financial institutions	----------	----------	----------
Total	957,684.89	1,119,732.50	1,345,470.26

	1921	1922	1923
1. Cash on hand	$34,955.91	$43,271.95	$29,106.69
2. Loans on mortgage security	1,254,404.98	1,299,535.98	1,522,738.17
3. Loans on stock certificates or pass-book security	8,806.75	16,672.24	18,042.25
4. Loans on other security	27,614.75	35,655.23	28,759.60
5. Furniture and fixtures	----------	----------	500.00
6. Real estate sold on contract	750.00	----------	----------
7. Real estate—office building	22,500.00	22,500.00	22,500.00
8. Due from borrowers for insurance and taxes	188.34	734.38	64.14
9. Bonds	24,279.54	5,000.00	----------
10. Deposits in other building and loan associations	55,500.00	94,000.00	181,500.00
11. Deposits in other financial institutions	----------	10,000.00	15,000.00
Total	1,429,000.27	[1] 1,527,369.78	1,818,210.85

[1] Discrepancy of 40 cents not explained.

LIABILITIES

	1918	1919	1920
1. Running stock and dividends	$219,542.85	$207,326.07	$196,473.26
2. Loan stock and dividends	39,364.35	38,705.94	43,245.02
3. Credits on mortgage loans	107,785.64	104,018.30	161,511.68
4. Credits on real estate sold on contract	132.69	198.53	259.50
5. Paid-up stock and dividends	45,755.06	60,711.93	92,138.60
6. Deposits and accrued interest	510,688.30	664,371.72	810,451.88
7. Reserve fund	14,310.00	15,760.00	18,069.75
8. Undivided profit fund	14,711.52	14,951.62	14,951.62
9. Contingent profit on real estate sold on contract	50.00	50.00	50.00
10. Due borrowers on unfinished buildings	5,344.48	8,688.39	8,318.95
11. Deposits from other building and loan associations	----------	5,000.00	----------
Total	957,684.89	1,119,732.50	1,345,470.26

Reporter's Statement of the Case

LIABILITIES—Continued

	1921	1922	1923
1. Running stock and dividends	$211,031.96	$158,838.96	$152,964.34
2. Loan stock and dividends	48,839.52	41,216.81	42,976.41
3. Credits on mortgage loans	161,940.61	197,594.15	231,057.22
4. Credits on real estate sold on contract	317.12		
5. Paid-up stock and dividends	95,235.77	151,188.55	181,248.64
6. Deposits and accrued interest	869,981.31	932,918.28	1,142,796.73
7. Reserve fund	21,702.36	23,302.36	25,132.36
8. Undivided profit fund	14,951.62	20,161.07	29,659.67
9. Contingent profit on real estate sold on contract	50.00		
10. Due borrowers on unfinished buildings	4,950.00	2,150.00	12,375.48
11. Deposits from other building and loan associations			
Total	1,429,000.27	[1] 1,527,370.18	1,818,210.85

[1] Discrepancy of 40 cents not explained.

VIII. During the years in question the plaintiff made loans to members and to nonmembers in number and amount and on security as follows:

Security	Borrowers			
	Members		Nonmembers	
	Number	Amount	Number	Amount
1918				
Homes	33	$17,610.00	24	$30,124.00
Real estate	3	9,700.00		
Farms	4	2,835.00	10	12,010.00
Business			4	46,500.00
Churches			1	7,500.00
Collateral	4	2,115.00	20	2,555.00
Total	44	32,260.00	59	98,689.00
1919				
Homes	135	170,430.50	36	62,835.00
Real estate	7	12,350.00	4	4,700.00
Farms	16	9,600.00	4	11,350.00
Business			3	22,500.00
Collateral	11	1,655.00	44	20,053.70
Total	169	194,035.50	91	121,438.70
1920				
Homes	131	164,171.45	46	104,125.00
Real estate	5	1,840.00	4	4,700.00
Farms	5	4,850.00	10	24,505.00
Business	1	12,000.00	10	84,500.00
Churches	1	700.00		
Collateral	9	3,195.00	32	14,642.42
Total	152	186,756.45	102	232,472.42

Security	Borrowers			
	Members		Nonmembers	
	Number	Amount	Number	Amount
1921				
Homes	149	182,285.00	19	$49,650.00
Real estate	9	4,785.00	----	----
Farms	12	14,850.00	1	4,000.00
Business	6	32,500.00	9	127,100.00
Churches	----	----	1	15,500.00
Apartments	1	5,000.00	----	----
Collateral	4	16,750.00	27	9,385.00
Total	181	256,170.00	57	205,635.00
1922				
Homes	157	185,160.35	4	10,000.00
Real estate	2	1,575.00	----	----
Farms	12	12,750.00	----	----
Business	3	3,800.00	6	84,000.00
Churches	1	5,000.00	----	----
Collateral	5	1,675.00	35	19,530.00
Total	180	209,960.35	45	113,530.00
1923				
Homes	222	355,506.98	1	700.00
Real estate	13	14,900.00	----	----
Farms	13	29,200.00	----	----
Business	9	159,600.00	----	----
Apartments	5	40,000.00	----	----
Collateral	10	9,905.00	28	9,845.00
Total	272	609,111.98	29	10,545.00
1918–1923				
Mortgage	955	1,452,999.28	197	706,299.00
Collateral	43	35,295.00	186	76,011.12
Total	998	1,488,294.28	383	782,310.12

IX. At no time during the period in question did plaintiff lend money to a nonmember in preference to a member.

X. On September 18, 1924, the Commissioner of Internal Revenue assessed against the plaintiff income and excess-profits taxes for the calendar year 1918, $1,963.33 and $265.05 interest; for the calendar year 1919, $1,552.20 and $199.55 interest; for the calendar year 1920, $1,879.75 and $253.76 interest; for the calendar year 1921, $2,294.91 and $309.81 interest; for the calendar year 1922, $3,688.18; and for the calendar year 1923, $4,377.43. The collector of internal revenue for the 11th district of Ohio made formal demand upon the plaintiff for the payment of the said taxes and interest,

against which the plaintiff protested. In order to avoid the imposition of penalties and the seizure, distraint, and sale of its property in satisfaction of such taxes and penalties, the plaintiff, on the 18th of September, 1924, under specific protest, paid the said taxes to the said collector and they were thereafter covered into the Treasury of the United States.

XI. On September 25, 1924, the plaintiff appealed to the Commissioner of Internal Revenue and filed with him a claim for refund of the whole amount of the aforesaid taxes and interest. On November 26, 1924, the commissioner rejected the said claim except as to $922.05 of the taxes assessed and paid for the year 1922, and $1,094.36 of the taxes assessed and paid for 1923, for which he issued certificates of overassessment, leaving as the aggregate amount rejected the sum of $14,767.56, which is still retained in the Treasury of the United States.

The court decided that plaintiff was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

This is an action by plaintiff, the Cambridge Loan and Building Company, for the recovery of the sum of $14,767.56, which it alleges was illegally collected by the Government as income tax for the years 1918 to 1923, inclusive. Said taxes were paid under protest, and a claim for refund was duly filed with the Commissioner of Internal Revenue and was rejected on the 26th day of November, 1924.

The question for determination is whether or not plaintiff is entitled to exemption from taxes under the provisions of the revenue acts of 1918 and 1921, respectively.

Under section 231 (4) of the revenue act of 1918, 40 Stat. 1057, exemption is granted to "Domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit."

Under section 231 (4) of the revenue act of 1921, 42 Stat. 253, exemption is granted to "Domestic building and loan associations, substantially all the business of which is confined to making loans to members."

The act of 1918 is applicable to the years 1918, 1919, 1920, and from January 1 to November 23, 1921; and the act of 1921 is applicable to the period between November 23 and December 31, 1921, when the act was passed, and to the years 1922 and 1923.

Plaintiff company was organized and incorporated under the laws of the State of Ohio in 1885, and has continuously since that time been engaged in the business of a building and loan association. Its capital stock for the years 1918 to 1923, inclusive, was $1,500,000, of the par value of $50 a share.

Under the provisions of its constitution and by-laws plaintiff company was organized "For the purpose of raising money to be loaned to its members and others, and for such other purposes as are authorized by law."

It is contended by the Government that the method pursued by plaintiff in the transaction of its business was of such a character as to destroy the essential requirements of building and loan associations as contemplated by the taxing statutes involved herein.

In an effort to ascertain the intention of Congress in the enactment of the exemption provisions of the acts of 1918 and 1919, it is deemed important to briefly review the history of legislation on this question, as well as the current administration of the various statutes by the Internal Revenue Bureau.

The revenue act of 1909 provided that the special excise tax therein contemplated should not apply to "domestic building and loan associations organized and operated exclusively for the mutual benefit of their members." Under this act certain litigation arose, resulting in each case in decisions favorable to the taxpayer. The Internal Revenue Bureau accepted the decisions of the courts and refunded all taxes which had been collected under this act, except those taxes which had been barred by the statute of limitations. In February, 1917, Congress authorized and directed the refund of all such taxes, referring to same as taxes "illegally collected from said associations under the excise tax act of August 5, 1909."

Opinion of the Court

By the act of October 3, 1913, the restrictive term "exclusively" was omitted, the act merely providing that the tax therein imposed should not apply to "domestic building and loan associations." Under this act no building and loan association was subjected to the payment of a tax, nor were they required to file a tax return.

By the act of September 8, 1916, Congress provided that "there shall not be taxed under this title any income received by * * * Fourth. Domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit." No building and loan association was subjected to the payment of income tax under this statute, nor was any tax return required to be filed.

The 1918 act, section 231 (4), contained the same language as that employed in the 1916 act, and under this statute no income tax was assessed or collected, nor was any return required.

The act of 1921, passed November 23, of that year, modified the 1916 and 1918 acts, in so far as it relates to building and loan associations, in only one particular. It provided for the exemption of those associations "*substantially* all the business of which is confined to making loans to members."

It will be noted, therefore, that under none of the acts, except the act of 1909, was any income tax required to be paid by any building and loan association; and that the taxes paid under the 1909 act were refunded.

A proper consideration of this legislation, together with the interpretation given to it by the Internal Revenue Bureau, covering a period of many years, and involving five separate legislative enactments; the elimination of the harsh provisions of the earlier act of 1909; and the refund of the taxes collected under the 1909 act would seem to indicate clearly a fixed purpose and intention on the part of Congress to exempt from taxation building and loan associations conforming in essential respects to the primary business of such associations. It was not until the early part of the year 1922, after the effective date of the act of 1921, that the Commissioner of Internal Revenue undertook to subject

any building and loan association to the payment of income tax.

The Government chiefly relies in this case upon the decisions in the case of *Acklin* v. *Peoples Savings Association*, 293 Fed. 392, and in the case of *Lilley Building & Loan Co.* v. *Miller*, 280 Fed. 145. The opinion in the former case announced certain general principles governing the operation of building and loan associations, which are usually accepted as sound and correct, but the sole question at issue in that case was whether or not the Commissioner of Internal Revenue had authority to define the qualifications for membership, the court holding that he had no such power. The purpose of citing this case in support of the Government's contention in the case now being considered is not clear.

Under the facts in the *Lilley case* the court held that the association was not a true building and loan association, but was in effect a savings bank. This action involved the years 1918, 1919, and 1920, and is therefore governed by the 1918 act. Conspicuous among the facts as they appear in the opinion are the following: Receipts of deposits from nonmembers constituted the bulk of its business. It received time deposits for which it issued certificates bearing interest at the rate of 5 per cent. The year 1920, considered as typical of the period of time involved, shows running stock of $121,000, paid-up stock of $123,000, deposits of $830,000, borrowed money $20,000, and a reserve fund of $18,500. Stockholders numbered 301, and borrowers 495, of whom only *two* were stockholders. It had 2,239 *savings* depositors. The deposits from nonmembers were evidenced by entries in books "such as are ordinarily used by *savings banks*." About 80 per cent of its receipts and 97 per cent of its loans were transactions with *nonmembers*.

A statement of the essential facts connected with the operation of plaintiff company will readily demonstrate the inapplicability of the decision in the *Lilley case* to the facts in the present case.

In the year 1918 forty mortgage loans were made to members and thirty-nine to nonmembers; in 1919, one hundred and fifty-eight to members and forty-seven to nonmembers; in 1920, one hundred and forty-three to members and seventy to nonmembers; in 1921, one hundred and seventy-seven to

members and thirty to nonmembers; in 1922, one hundred and seventy-five to members and ten to nonmembers; in 1923, two hundred and sixty-two to members and one to a nonmember. Through the entire period, 1918 to 1923 inclusive, nine hundred and fifty-five mortgage loans were made to members and one hundred and ninety-seven to nonmembers, the loans to members being more than 82 per cent of the total number of loans. In the *Lilley case*, out of a total of 495 loans, only two, or four-tenths of one per cent, were members or shareholders.

For the period from 1918 to 1923, inclusive, the total amount of loans was $2,271,604.40. Of this amount $1,488,-294.28 was loaned to members and $783,310.12 to nonmembers. While the ratio varied from year to year, the percentage for the whole period was 66 per cent to members and 34 per cent to nonmembers.

The net profits of plaintiff company for each year, after providing for expense of operation and the reserve required under the law of the State of Ohio, were distributed semi-annually, to members only, in dividends at the rate of 5.7 per cent for the year. The principal source of the earnings of the company was interest. It deposited surplus funds with other building and loan associations from which it derived interest at the rate of 6 per cent, and such deposits could be withdrawn at any time, and the earnings from these transactions likewise accrued to the benefit only of the members. It received deposits from nonmembers, evidenced by certificates of deposit or by pass books such as are in common use by building and loan associations. It paid interest on such deposits at the rate of 3 per cent, 4 per cent, and 5 per cent, determined by the length of time for which the deposit was allowed to be retained. Such deposits constituted a portion of the fund from which loans were made at the established legal rate, and the benefit from these transactions likewise accrued to the members alone. It deposited a part of its surplus funds in other building and loan associations. We fail to see the objection to this occasional practice, as it derived an advantageous return from such deposits which accrued also to the benefit only of members; and inasmuch as these deposits could be withdrawn at any time

it enabled plaintiff to carry a smaller banking balance. In making loans to nonmembers the borrowing needs of members were never neglected. So far as the record discloses, plaintiff was at all times in a position to supply the borrowing needs of its members, and at no time was a borrowing nonmember preferred over a member. A comparison of the receipts from members with the receipts or deposits from nonmembers can not be shown on account of the unsatisfactory state of the record, which seems to set forth as to this item only net balances at the end of the year. However, under our view of the whole case this information would not have a controlling influence in determining the rights of the parties.

It should be observed that in each of the acts dealing with the subject under consideration Congress has merely provided for the exemption from Federal taxation of "domestic building and loan associations" without attempting to define or describe such associations. The limitation in the 1909 act received the disapproval of Congress when it authorized and directed the taxes which had been collected under said act to be refunded, referring to same as taxes "illegally collected * * *." Inasmuch as Congress, during the period from 1909 to 1921, has deemed it proper to impose no limitation or restriction upon the exemption from taxes of building and loan associations, neither in express terms nor by defining a building and loan association, unquestionably the court is without authority to do so. In enacting these various statutes Congress was legislating with reference to building and loan associations *existing* and *operating at the time* under the various State laws. It was dealing for taxation purposes with a creature of the State, controlled and regulated by the State under its general police power. The law of the State in which they were created was the only law which described or defined a building and loan association, and Congress was chargeable with a knowledge of that law. Until the enactment of the 1921 act Congress accepted these associations as they existed and were operated in the different States; and it will be noted that in the 1921 act there was still no evident purpose of imposing any

restriction upon the methods of operation further than to confine the *benefits* of the statute to those associations making loans *substantially* to members. If Congress had desired to do so it could have further restricted the exemption and limited it not only to making loans to members but also to the acceptance of deposits only from members, or to the requirement that the amount of the loan should be measured by the amount of the subscription to stock, and many other things complained of by the Government; but it has not thus far done so. In the absence of such legislation it is not within the authority of the court to extend or restrict the provisions of the statute. Its proper function is to construe and apply the law as it is written.

There is appended hereto as a footnote [1] a compilation of the sections of the Ohio code containing the grant of

[1] OHIO CODE

SEC. 9643. *Interpretation of terms.*—A corporation for the purpose of raising money to be loaned to its members, and others, shall be known in this chapter and in the laws relating to the department of building and loan associations as a "building and loan association" or as a "saving association." * * *

SEC. 9648. *Receiving of deposits; joint accounts.*—To receive money on deposits, and all persons, firms, corporations, and courts, their agents, officers, and appointees may make such deposits and stock deposits, but such corporation shall not pay interest thereon exceeding the legal rate. * * *

SEC. 9652. *Withdrawal of deposits.*—To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor any demand, commercial, or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by nonnegotiable orders.

SEC. 9653. *Cancellation.*—To cancel shares and parts of shares of stock upon which the credits have been withdrawn, or upon which loans have been repaid, and reissue them as new stock.

SEC. 9655. *Property, leasing, holding of.*—To lease, acquire, hold, encumber, convey, and rent such real estate and personal property as is necessary for the transaction of its business, or necessary to enforce or protect its securities.

SEC. 9656. *Borrowing money.*—To borrow money, not exceeding twenty per cent of the assets, and issue its evidence of indebtedness or other security therefor.

SEC. 9657. *Loans; enumeration of securities.*—To make loans to members and others on such terms and conditions as may be provided by the association and upon the following securities only:

First. Obligations secured by mortgage or deed of trust on real estate or any leasehold estate therein, which mortgages or deeds of trust may be made direct to the association or they may be made to third persons or corporations and pledged by them to the association as collateral. Such obligations shall be the first liens on real estate, or any leasehold estate therein, but additional loans may be made where the association holds all prior mortgage liens. Nothing herein, however, shall prevent an association organized under this act from accepting additional security other than that herein provided where the pri-

authority by the State for the operation of building and loan associations in that State. Operating under that authority and grant of powers plaintiff company has, since the year 1891, submitted an annual report to the superintendent of building and loan associations as required by law, and has received a certificate each year to the effect that it had complied with the Ohio laws relating to the conduct of its business as a building and loan association. It should be stated in this connection that during the years in question here only one objection was made by the State authorities to the methods employed by plaintiff in the operation of its business, and that had reference to a $5,000 hotel bond acquired by plaintiff as an investment. The situation was corrected in accordance with the requirement of the superintendent of building and loan associations.

It will be noted that plaintiff company was authorized to receive deposits from nonmembers and to make loans to members and nonmembers. In the decision in the *Lilley*

mary and principal security is a first mortgage or deed of trust on real estate or any leasehold estate therein.

Second. Obligations secured by pledge of stock or of deposits in such association, but such loans shall not exceed either the paid-up value or the withdrawal value of such stock or deposits.

Third. Obligations secured by pledge of any of the securities provided for in section 9660 of the General Code, not to exceed, however, ten per cent of the assets of the association.

Fourth. Building and loan companies that have been making loans primarily on other securities than those named in the above sections continuously since January 1, 1913, are authorized to continue the loaning on such securities.

SEC. 9660. *Investment of idle funds up to 20 per cent.*—To invest any of its idle funds, or any part thereof, in bonds or interest-bearing obligations of the United States, or of the District of Columbia, or of the State of Ohio, or of any county, township, school district, or other political division in the State of Ohio, or of any incorporated city or village in the State of Ohio, or in farm-loan bonds issued under the provisions of the act of Congress known as the Federal farm loan act, approved July 17, 1916, and amendments thereto; and in such other securities as now are or hereafter may be accepted by the United States to secure Government deposits in national banks. But such investments at no time shall amount in the aggregate to more than twenty per cent of the assets of such corporation.

SEC. 9662. *Consent of superintendent to sell, etc.*—To buy but not to sell, except with the written consent previously granted by the superintendent of building and loan associations, interest-bearing obligations secured by real-estate mortgages, which shall in all respects comply with and be within the rules adopted for making mortgage loans by the corporation making such investments. Such mortgage investments may be held and reported as mortgage loans.

SEC. 9663. *Distribution of earnings.*—To make such annual or semiannual distribution of the earnings as is hereinafter provided, and as the constitution and by-laws may prescribe.

case the court stated that "It is not thought that the making of *loans* to *nonmembers*, or *borrowing* from nonmembers, or *receiving deposits* to be withdrawn on demand or on time, so long as such transactions are simply incidental to the *primary business* of operating a mutual building and loan association, would defeat the exemption." The *primary* business of a building and loan association is to raise money to be loaned to its members and others.

When it is remembered that the entire *benefit* derived from the transactions which characterized plaintiff's business operations accrued to members alone, can it be said that those transactions resulted in the destruction or the serious impairment of the primary business of operating a building and loan association as contemplated in the taxing statutes? We think not.

During the years 1918, 1919, and 1920, and until November, 1921, plaintiff company was operating under statutes which, as stated hereinbefore, imposed no limitation whatever. No tax was collected and no tax return was required. The history of this legislation, as above outlined, together with the continuing and consistent interpretation given to those acts by the administrative officials of the Government during a period of more than twelve years, and under five successive revenue acts, if not controlling, certainly constitutes a strongly persuasive influence in a proper determination of this case. The act of 1921 exempting only such associations as confined their loans substantially to members could not affect the legal status of associations operating prior thereto and under other acts which did not even require the filing of a tax return. In attempting, after the passage of the 1921 act, to enforce the collection of taxes under prior acts the Commissioner of Internal Revenue was evidently under the impression that the exemption under the prior acts was likewise intended only for associations whose business was substantially confined to loans to members. The 1921 act is not susceptible of this construction. It was operative only upon the business of such associations after the effective date of the act. It should be stated in this con-

nection that since the passage of the 1921 act plaintiff company has substantially complied with its provisions.

There is one other point that deserves mention. In the *Lilley case* the court held that the words "without capital stock organized and operated for mutual purposes and without profit" in the 1916 and 1918 acts qualified both cooperative banks and building and loan associations. The Government in this case makes the same contention, under the ruling in the *Lilley case*. The legislative history of the act in question easily demonstrates that such was not the intention of Congress. The House bill contained only the provision for the exemption of "Domestic building and loan associations." The Senate proposed an amendment providing for the exemption of "cooperative banks without capital stock organized and operated for mutual purposes and without profit * * *." The House disagreed, and the matter went to the conference committee. The explanation by the managers of the House of their agreement with the Senate is as follows: "The Senate amendment provides that the income of cooperative banks organized and operated for mutual purposes and without profit shall be exempted from the income-tax provision. The House recedes from its disagreement to the Senate amendment, *with an amendment exempting cooperative banks without capital stock organized and operated for mutual purposes and without profit*." It was clearly the purpose of Congress to exempt cooperative banks as described and defined in the act in addition to building and loan associations, and in the very nature of the case the qualifying language was intended to apply only to such banks. Furthermore, it is provided in article 68 of Treasury Regulations 33 promulgated under the 1916 act under the heading "unconditional" that "Among the corporations exempt from tax, *without condition* are * * * domestic building and loan associations * * *." In the opinion of the court the construction given to the act by the court in the *Lilley case* and contended for by the Government in the instant case is not sound. The qualifying language was intended to apply only to cooperative banks.

The plaintiff is entitled to judgment for the amount of taxes which have not been refunded, amounting to $14,767.56, together with interest from September 18, 1924, amounting to $2,407.11, an aggregate of $17,174.67. And it is so ordered.

HAY, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

TOXAWAY MILLS v. THE UNITED STATES

[No. D-789. Decided June 6, 1927]

On Mandate of Supreme Court

Statute of limitations; internal-revenue tax; bar against United States; refund; overpayment.—The effect of section 1106 (a) of the revenue act of 1926, that "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy, but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax," upon the right of a party to a refund of all taxes paid after the bar of the statute has fallen, *held* not concluded by the judgment in the instant case.

The Reporter's statement of the case:

The original judgment in this case was rendered December 7, 1925, and is reported in 61 C. Cls. 363. A writ of certiorari was granted, and upon the mandate of the Supreme Court and motion of the plaintiff for judgment in accordance therewith, the court below, adopting the special findings of fact theretofore made, gave judgment for plaintiff in the sum of $9,876.68, with interest from November 8, 1923, to date of judgment, aggregating $11,996.87.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This case was submitted to the court upon the plaintiff's motion for judgment in accordance with the mandate of the Supreme Court of the United States. The judgment of

this court was that the petition be dismissed. A writ of certiorari was granted by the Supreme Court and from the mandate it appears as follows:

"This cause having been called to the attention of the court by Mr. Solicitor General Mitchell, of counsel for the appellee, and he having confessed error and moved the court to reverse the judgment of the Court of Claims in this cause,

"Therefore, in pursuance of said motion, it is now here ordered and adjudged by this court that the judgment of the said Court of Claims, in this cause, be, and the same is hereby, reversed;

"And it is further ordered that this cause be and the same is hereby remanded to the Court of Claims for further proceedings."

The case was tried upon a stipulation of facts which this court considered insufficient, but the cause having been reversed it only remains to obey the mandate by awarding judgment.

We think it proper, because of other cases, to say that the jurisdiction of the Court of Claims in this class of cases grows out of the statute providing for a refund of taxes by the Commissioner of Internal Revenue where they have been erroneously or illegally collected, and since the decision of the case by this court in December, 1925, 61 C. Cls. 363, the revenue act of 1926, 44 Stat., 9, 113, has been passed, which, among other things, provides:

"Sec. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy, but shall extinguish the liability; *but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax.*"

The effect, if any, of this act upon the right of a party, except in the instant case, to a refund of all taxes paid after the bar of the statute has fallen is a question not concluded by the judgment herein.

MOSS, *Judge;* GRAHAM, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

CHICAGO CHEESE & FARM PRODUCTS COMPANY v. THE UNITED STATES [1]

[No. E-287. Decided June 6, 1927]

On the Proofs

Taxes; filled cheese; "Daisy Food Product."—Plaintiff's product, sold under the designation of "Daisy Food Product," made of wet casein or curd, obtained from milk, and into which is introduced coconut oil, *held* taxable as filled cheese.

The Reporter's statement of the case:

Mr. Willis D. Nance for the plaintiff. *Kirkland, Patterson & Fleming* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Mr. Frank R. Pentlarge as *amicus curiæ*.

The court made special findings of fact, as follows:

I. The plaintiff herein is, and was during the period involved, a corporation organized and existing under the laws of the State of Illinois and engaged in the manufacturing and jobbing of cheese and other food products.

II. For the year beginning July 1, 1924, a manufacturer's tax of $400 was assessed by the defendant against the plaintiff as a manufacturer of "filled cheese." A special tax stamp was issued to and paid for by the plaintiff March 20, 1925.

For the sale of a product known as "Daisy" during the period March 1, 1925, to March 14, 1925, a sales tax of $490.73 was assessed. This latter tax was assessed against plaintiff's product as a "filled cheese" and was paid by the plaintiff March 19, 1925.

These two sums were paid under protest and a claim for refund made by the plaintiff. Under date of April 10, 1925, plaintiff's claims were rejected by the Commissioner of Internal Revenue.

III. Plaintiff's product "Daisy" was during said period prepared in the following manner: Wet casein or wet curd, the two being for purposes herein synonymous, was pur-

[1] Petition for writ of certiorari dismissed.

chased by the plaintiff from factories manufacturing the same. Casein is a chemical product contained in milk and obtained therefrom by treatment of the milk when skimmed with rennet or acid to coagulate it. From this coagulation water is pressed, the resulting product being wet curd or wet casein.

When this curd was received by the plaintiff it was placed in containers with perforated bottoms and water added for the purpose of washing away any of the remaining acids or flavors. This water was then pressed out and the curd placed in a vat. To this curd was then added coconut oil and a small percentage of vegetable coloring and salt. The coconut oil and curd were mixed by the use of a device similar to the ordinary form of meat chopper and the mixture was afterwards chilled. Chilling at this stage in the manufacture is necessary to keep the coconut oil from separating from the curd. After chilling, it was again passed through the chopper, stuffed into linen bags, and pressed into shape, so as to make a commercial package of about four pounds.

The resulting product was soft and had the outward appearance and texture of soft cheese. Under temperatures ranging around sixty degrees, the product would hold up for about a week, but in warmer temperatures would disintegrate in some three or four days, the oil separating itself from the rest of the mass and the product generally becoming moldy in condition. It was therefore necessarily sold to a market which could be reached by not more than an overnight's journey and even in such markets experienced a high percentage of returns.

Because of its texture, any branding as required under the filled cheese law of 1896 would not remain legible for more than a few moments, the ink spreading rapidly and becoming absorbed.

IV. When this product was first manufactured by the plaintiff, it was denominated "Daisy Brand Farmers Cheese," and "Daisy Brand Dutch Cheese," but under advice from the Department of Agriculture administrating pure-food regulations, the labels attached to this product were

changed so as to eliminate the reference to the product as a cheese and during the period March 1 to March 14, 1925, labels calling this product a cheese were not used by the plaintiff, and it was designated as "Daisy Food Product."

V. Generally speaking there are two types of cheese—hard and soft. Hard cheese, as a commercial article, was introduced into this country early in the nineteenth century and conformed to a process developed at Cheddar, England, the resultant name of that type of cheese being, therefore, "Cheddar cheese." This general name was continued in use in this country. "Cheese," when spoken of unqualifiedly during the period 1895–96 and prior thereto, usually signified a hard or Cheddar type cheese. Soft cheese, while made abroad and to a limited extent in this country as early as 1872, was until about 1900 manufactured in such small quantities as to be almost negligible in amount in comparison with hard cheese. Since that date, however, it has become increasingly popular. It is now given the general name of "cream cheese," which name had for many years been used only in connection with a hard type of cheese.

VI. Cheddar, or the hard type of cheese, is manufactured from whole milk. This milk is heated to about 85 degrees temperature and rennet in sufficient quantity is introduced to coagulate the milk in from 20 to 25 minutes. The mass is then heated to about 102 degrees; the whey is drawn off; it is matted, milled, and rematted, salted, and put through a press. This procedure consumes approximately six hours. The product is then set away for curing. This curing process varies in accordance with the strength or sharpness of taste desired and may extend over several months' period.

In the making of soft cheese the same process obtains except that the milk is not heated to such a high degree of temperature before the rennet is introduced, and a comparatively small quantity of rennet is used. This smaller quantity of rennet, together with the lower temperature, results in coagulation being retarded, so that it is not completed until the expiration of approximately 12 hours. After coagulation it is again not subjected to such a high degree of temperature as in the case of the making of the hard cheese, and it is allowed to settle and set in this soft condi-

tion. A soft cheese necessarily must be placed upon the market as soon as manufactured, for because of its nature it will not keep in the same manner as does a hard cheese.

Hard cheeses were made in cylindrical form and in weight varied from approximately 10 to 85 pounds, the greater amount being in the larger forms. Soft cheese has always been marketed in smaller weights, because its nature would cause it to fall apart if made in the form and weight customary for firm types of cheeses. A soft cheese can not be made so as to hold a brand for more than a few minutes, nor can it be made large enough and hold it own weight if made of sufficient size to contain twelve letters to contain the branding required under the filled cheese act of 1896.

VII. Casein as it exists in milk or skimmed milk is a soluble calcium compound. It can not be seen except by the help of an ultramicroscope. It exists in practically a dissolved state or colloidal condition. When it is taken out of milk its chemical name is calcium paracaseinate; its common name is then wet solid casein or wet curd. When removed it becomes denatured in that it loses the physical properties which it had when it existed in the parent substance. It is then a clot which has imbibed a considerable amount of moisture and is mushylike and slimy. Casein, when once removed from milk, can not be returned to the same state in which it existed previously in the milk, because it has of its nature then changed its properties.

Butterfat in milk is in a purely suspended condition in the form of oil globules. The particles of dissolved casein surround each small globule of butterfat. When clotted by the use of rennet or acid the casein changes its condition and becomes a smooth clot surrounding each of these small globules of butterfat and presenting a covering to such globules in such form that the oil can not work itself out nor any foreign substance work themselves in. Such a mass can subsequently be worked into the smooth consistency of cheese. If, however, butterfat is first taken away from the milk and the skimmed milk then clotted or coagulated, the casein changes its physical properties and forms a clot of a solid nature which has water imbibed in it. If at that period it is attempted to return the butterfat or add other fats to

the mixture, it is found to be impossible to mix such fats into the same form as they appeared before, because the oil can not then penetrate the clot. The mixture will, therefore, remain purely distinct particles; that is, butterfat particles and casein particles. Such a product has more of a granular than a smooth consistency.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff is an Illinois corporation engaged in manufacturing what it designates as a food product. The Commissioner of Internal Revenue levied and collect a manufacturer's and a sales tax upon plaintiff's business under the act of June 6, 1896. The manufacturer's tax amounted to $400 per annum and the sales tax amounted to $490.73, extending over a period from March 1, 1925, to March 14, 1925, a total tax exaction of $890.73, and it is for the recovery of this amount, with interest thereon from date of payment, that this suit is brought. No jurisdictional question is involved.

The act of June 6, 1896, 29 Stat. 253, is in terms as follows:

"*Be it enacted by the Senate and House of Represenatives of the United Statees of America in Congress assembled.* That for the purposes of this act, the word 'cheese' shall be understood to mean the food product known as cheese, and which is made from milk or cream and without the addition of butter, or any animal, vegetable, or other oils or fats foreign to such milk or cream, with or without additional coloring matter.

"SEC. 2. That, for the purposes of the act certain substances and compounds shall be known and designated as 'filled cheese,' namely; All substances made of milk or skimmed milk, with the admixture of butter, animal oils or fats, vegetable or any other oils, or compounds foreign to such milk, and made in imitation or semblance of cheese.

"SEC. 3. That special taxes are imposed as follows:

"Manufacturers of filled cheese shall pay four hundred dollars for each and every factory per annum. Every person, firm, or corporation who manufactures filled cheese for sale shall be deemed a manufacturer of filled cheese. * * *

* * * * * * *

Opinion of the Court

"SEC. 6. That filled cheese shall be packed by the manufacturers in wooden packages only, not before used for that purpose, and marked, stamped, and branded with the words 'filled cheese' in black-faced letters not less than two inches in length, in a circle in the center of the top and bottom of the cheese; and in black-faced letters of not less than two inches in length in line from the top to the bottom of the cheese, on the side in four places equidistant from each other; and the package containing such cheese shall be marked in the same manner, and in the same number of places, and in the same description of letters as above provided for the marketing of the cheese; and all sales or consignments made by manufacturers of filled cheese to wholesale dealers in filled cheese or to exporters of filled cheese shall be in original stamped packages. Retail dealers in filled cheese shall sell only from original stamped packages, and shall pack the filled cheese when sold in suitable wooden or paper packages, which shall be marked and branded in accordance with rules and regulations to be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. Every person who knowingly sells or offers to sell, or delivers or offers to deliver, filled cheese in any other form than in new wooden or paper packages, marked and branded as hereinbefore provided and as above described, or who packs in any package or packages filled cheese in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall upon conviction thereof be fined for each and every offense not less than fifty dollars and not more than five hundred dollars or be imprisoned not less than thirty days nor more than one year.

* * * * * * *

"SEC. 9. That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided by this section.

* * * * * * *

"SEC. 11. That all filled cheese as herein defined imported from foreign countries shall, in addition to any import duty

imposed on the same, pay an internal-revenue tax of eight cents per pound, such tax to be represented by coupon stamps; and such imported filled cheese and the packages containing the same shall be stamped, marked, and branded, as in the case of filled cheese manufactured in the United States.

* * * * * * *

"SEC. 15. That the Commissioner of Internal Revenue is authorized to have applied scientific tests, and to decide whether any substances used in the manufacture of filled cheese contain ingredients deleterious to health. But in case of doubt or contest his decision in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon General of the Army, the Surgeon General of the Navy, and the Secretary of Agriculture, and the decision of this board shall be final in the premises.

* * * * * * *

"SEC. 18. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of this act."

The commissioner collected the taxes above mentioned by classifying plaintiff's product as "filled cheese" under section 2 of the statute. Plaintiff is now insisting that in this respect the commissioner was in error, and asserts that its product is not within the meaning and intent of the statute in any event.

The statute defines cheese first by designating it as "the food product known as cheese" and then by its ingredients, viz, "Made from milk or cream and without the addition of butter, or any animal, vegetable, or other oils or fats foreign to such milk or cream, with or without additional coloring matter." Obviously Congress by this procedure was referring to a known food product made by a process which utilized the natural ingredients of milk and cream, and eliminated the introduction of foreign ingredients in its composition. Section 2 manifestly takes up the identical subject and seeks to handicap its manufacture when the same resultant product is obtained by the use of foreign ingredients and the latter imitates the former. Clearly there can be little doubt that the mischief to be corrected by the statute was a

growing and expanding attempt to utilize skimmed milk or milk from which the animal fats had been extracted and replace them by foreign fats or oils and produce a product capable of being marketed as cheese. Congress was attempting to preserve the pure-cheese industry and maintain its marketable stability by imposing a tax burden upon the cheaper commodity made by the employment of foreign substances, and which in competition with the natural product would materially supplant it in the trade. Much expert testimony has been adduced, and a record of rather great proportions has been built up; but in reconciling conflicts and giving effects to its weight there is no doubt that the plaintiff's product is made from casein, a by-product of skimmed milk, with which coconut oil is mixed for the express purpose of supplying the animal fats absent in skimmed milk. This, in our opinion, is the very thing the statute was seeking to tax. The language used could not make it plainer—"all substances made of milk or skimmed milk, with the admixture of butter * * * or compounds foreign to such milk, and made in imitation or semblance of cheese." Plaintiff's product has the outward appearance and texture of soft cheese, and the fact is conceded that it is not made from the natural ingredients of milk or cream.

Plaintiff seeks to escape the tax upon the theory that casein is not milk or skimmed milk. This contention we regard as untenable. The vital ingredient, aside from animal fats, in whole milk or cream to cheese making is casein. If allowed to remain in the milk, as in pure cheese making, it surrounds the globules of butterfat, and when clotted furnishes the combined mass which is subsequently worked into the consistency of cheese. Milk from which the cream and casein have been extracted would be utterly worthless in cheese making. Therefore, plaintiff utilizes the cheese-making qualities of skimmed milk in so far as they are available and supplies the deficiencies by the introduction of unnatural and foreign substances, creating a product of the texture and appearance of soft cheese. If the plaintiff purchased skimmed milk and produced its own casein, the result would be exactly the same. Plaintiff could not make its product from skimmed milk alone. It is the casein in the milk, to

which is added the foreign fats or oils, that brings forth what plaintiff sells at present as a food product. Obviously this is doing indirectly what the statue intends to reach. Casein is nothing more nor less than skimmed-milk curd. It is true that plaintiff purchased casein from outside parties and did not extract it from its own skimmed milk; but clearly the distinction is one of form and not of substance. The only ingredient of skimmed milk available to plaintiff in its manufacturing process was casein, and it might just as well have purchased its own skimmed milk directly and precipitated the casein therefrom. One may not escape a statutory provision by resorting to an outside source for the convenient and economical supply of an ingredient which, of itself, is the basic factor in a manufacturing process which the statute regulates and defines. Plaintiff uses skimmed milk to the very same extent it would have used the same if it had been impossible to purchase casein from others. Resort to purchasing casein was a mere convenience and doubtless cheaper than producing its own from skimmed milk.

Stress is put upon the contemporaneous condition of the cheese industry in 1896 when the statute was passed, and from the record a contention is made that the statute was intended to reach only imitations of hard or Cheddar cheese; that soft or cream cheese was practically unknown in 1896 and imitations of Cheddar cheese were influencing the foreign market and making serious inroads upon the domestic trade. The statute is not ambiguous. Its provisions are plain and the intent apparent. Section 2 defines "filled cheese." If plaintiff's product falls within the definition the tax attaches, notwithstanding the fact that in 1896 similar products may not have been manufactured.

While we have given the plaintiff the benefit of Finding V, in our opinion the scope and plain intent of the act were to prevent imitations of natural cheese and save the public from purchasing imitations thereof, unless duly informed to that effect by proper brands and marking. To restrict the application of legislation of this character, legislation affecting the food supply to the narrow limits of form and

technical names applied to the industry in 1896 is, we believe, without warrant of law. Congress was striking at the perversion of the usual and natural processes of making pure cheese. Substitutes for the natural ingredients of milk and cream in the industry were the primary factors of its concern, both the practices then extant, or those which the future might develop.

The petition will be dismissed. It is so ordered.

MOSS, *Judge;* HAY, *Judge;* and CAMPBELL, *Chief Justice,* concur.

GRAHAM, *Judge,* took no part in the decision of this case.

GEORGE W. LEECH v. THE UNITED STATES

[No. F–103. Decided June 6, 1927]

On the Proofs

Lease; occupancy after expiration; rental.—The defendant, occupying plaintiff's premises as a post office three months after expiration of a ten-year lease, *held* entitled to reasonable compensation for such occupancy.

The Reporter's statement of the case:

Mr. Elwood C. Weeks for the plaintiff.

Mr. W. W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. George W. Leech, plaintiff, a resident of Pleasantville, New Jersey, has at all times borne true allegiance to the United States of America and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

II. Plaintiff, during the period extending from September 9, 1925, to December 7, 1925, both inclusive, and at all times herein mentioned was, and still is, the owner of the lands, premises, and equipment used by defendant from September 9, 1925, to December 7, 1925, both inclusive, for

conducting a United States post office in the city of Pleasantville, Atlantic County, New Jersey.

Said premises were known as "a certain room, thirty feet by sixty-five feet, inside measurement, on the first floor of the three-story and cellar concrete and brick premises known as Nos. 2 and 4 North Main Street, situated on the northeast corner of North Main Street and Washington Avenue, on lot 1 of block 103, in said city, of Pleasantville."

III. Said post-office room was fitted and supplied by plaintiff with a complete equipment of boxes, fixtures, and furniture for the use of the post office, with city, rural-delivery, parcel-post, and postal-savings furniture, together with necessary heat and light, heating and lighting fixtures, and requisite water-closets, urinals, water, and a fireproof safe with burglar-proof chest.

IV. Prior to September 9, 1925, the defendant occupied said premises under a ten-year rental lease from plaintiff, which expired on September 8, 1925; under said lease plaintiff was to furnish heat and light and post-office furniture and fixtures for conducting a post office therein; the rental fixed in said lease was $1,200 per year, payable quarterly.

V. Prior to the expiration of said lease the Government called for bids for premises to be rented and used as a post office after the termination of said lease which resulted in the Government renting premises other than those belonging to plaintiff. At the expiration of said lease plaintiff communicated with the postmaster at Pleasantville as to what rental the Government intended to pay him while the Government occupied his premises pending the completion of their new quarters. Within two weeks after the termination of said lease plaintiff served notice in writing for the defendant to vacate his said premises. Plaintiff and defendant conducted negotiations, but reached no agreement as to the amount of rental to be paid plaintiff for the occupation by defendant of said premises during the period between the expiration of said lease and its removal to its new post-office quarters.

VI. After the expiration of said rental lease the defendant continued to occupy said premises, awaiting the completion of its new quarters, and conducted a post office therein from September 9, 1925, until December 7, 1925, both inclusive, during which time plaintiff furnished no light—the necessary light for conducting said post office being furnished and paid for by defendant.

VII. During said three-month period, from September 9, 1925, to December 7, 1925, inclusive, plaintiff received no compensation for the rental of said premises, fixtures, equipment, and heat, the reasonable value of which was $325 per month, or a total of $975 for said three-month period ending December 7, 1925.

The court decided that plaintiff was entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This case was submitted upon the report of the commissioner to whom it was referred by appropriate order for a report of the facts. There is no exception by either party to this report, and the court adopts it for its special findings of fact. These show that the Government had a lease on certain property of the plaintiff which was used as a post office. The lease was for ten years, expiring September 9, 1925. Prior to the termination of the lease steps were taken to secure quarters for the post office, with the result that another place was chosen. There was delay, however, in the completion of the new quarters, and the Government continued in possession of plaintiff's property until December 7, 1925, about three months after the lease terminated. The only material question in the case is what amount should be paid by the Government in the circumstances stated. The commissioner finds that the Government should pay $975 for the period mentioned, and judgment will be entered accordingly. And it is so ordered.

MOSS, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

Reporter's Statement of the Case

CHIMNEY ROCK COMPANY v. THE UNITED STATES[1]

[No. F-50. Decided June 6, 1927]

On the Proofs

Admission tax; use of road as entrance to resort.—Where a fee is exacted of persons using a private road only when they enter a certain pleasure resort, and both road and resort are owned by the same company whose principal business is operating the resort, the fee so exacted is an admission fee and taxable as such under the internal-revenue laws.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is and has been ever since the year 1916 a corporation organized and existing under and by virtue of the laws of the State of North Carolina, having its principal place of business at Chimney Rock, Rutherford County, in said State.

II. The principal business of plaintiff since 1916 has been the operation of a resort in North Carolina, known as "Chimney Rock." The outstanding feature of interest at this resort is a natural peak or pinnacle rising to an elevation of several hundred feet, from the top of which the scenery of the surrounding country may be viewed to a distance of approximately seventy miles. At said resort plaintiff constructed and maintained a hotel, a pavilion, a restaurant, and an elaborate system of trails and stairways for the use of persons visiting its property. Plaintiff owned in fee about one hundred and eighty acres of land immediately adjacent to and surrounding Chimney Rock and also owned an easement over other lands not owned by plaintiff, said easement consisting of a right of way from the boundary

[1] Writ of certiorari denied.

of plaintiff's land to the State highway between Asheville and Charlotte, North Carolina.

III. As a part and parcel of the plaintiff's resort it constructed an improved road over its own land and that which it had leased in perpetuity. This road is three miles in length, and runs from a river following the State highway between Asheville and Charlotte, North Carolina, north of Chimney Rock Mountain, and extending in a winding southerly direction up the mountain to a parking place at the base of what is known as the Chimney Rock Pinnacle or Cliff which rises abruptly for a distance of several hundred feet above the parking place. This road is a private road controlled by the plaintiff. The plaintiff exercises the right to refuse the use of this road to any person or persons whom the plaintiff may choose to exclude from the road.

The plaintiff, under its charter from the State of North Carolina had the right "to construct drives" and "to charge reasonable tolls and fares to persons using or visiting its property."

IV. Since May 1, 1920, the plaintiff has charged to each person using this road one dollar. If a person gained entrance to Chimney Rock by any other road he was required to pay the one dollar provided he used the said road in leaving Chimney Rock. The charge was one dollar for each person using the road, whether on foot, or horseback, or in a vehicle. If the vehicle contained more than one person, then each person therein was required to pay the dollar.

The said parking place, as well as the top of Chimney Rock Mountain, was accessible by the use of roads as well as trails both to pedestrians as well as to vehicular traffic without the necessity of one using the road constructed by the plaintiff, and to anyone so using such other roads or trails no charge was made by the plaintiff to any person who entered its property and used its steps and trails or its parking place or any part of its property other than its road, and such persons were permitted, without charge, to ascend to the top of Chimney Rock Cliff.

At a point on said road about two and one-half miles from the State highway and about one-half mile from Chimney

Reporter's Statement of the Case

Rock the plaintiff maintained a ticket office, which was open day and night, and in which was located its representative. It was the duty of this agent of the plaintiff to collect from each person passing his office the sum of one dollar. Upon the payment of this fee a strip ticket was issued to the patron, which ticket was collected by a representative of the plaintiff at a parking place at the base of Chimney Rock. This ticket was good only on the day of its purchase and entitled the purchaser to parking space and to use the trails and stairways and visit the other points of interest provided by the plaintiff at its resort. Any person was allowed to travel from the State highway up to plaintiff's ticket office, approximately two and one-half miles, and return from that point over plaintiff's road without being called upon to pay any sum, but if he passed the said ticket office to proceed to Chimney Rock he was obliged to pay the $1.

V. No part of the property of the plaintiff on Chimney Rock Mountain was inclosed, nor did the plaintiff conduct any form of amusement on its property, which was operated as a health resort and as a place for parking and viewing, from points provided by the plaintiff, the natural scenery.

VI. Plaintiff was required by the collector of internal revenue for the western district of North Carolina and by the Commissioner of Internal Revenue to collect admission taxes on the amount of said charges and to pay the same to the said collector, and the amounts so paid to the said collector monthly from July 19, 1921, to June 20, 1925, aggregated $14,896.56. Instead of requiring persons who used the said road to pay said taxes on the amount of its charge of $1.00, the plaintiff, during the whole of the said period, elected to and did pay these taxes itself by reducing its charge to ninety-one cents, paying to the said collector ten cents upon each charge collected.

Within four years next after the payment of the said taxes the plaintiff duly filed its appeal to the Commissioner of Internal Revenue for the refund thereof, but the said commissioner, on January 6, 1926, rejected the said claim.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

HAY, *Judge*, delivered the opinion of the court:

The plaintiff is a corporation and conducts in the State of North Carolina a resort at Chimney Rock Mountain in said State. Under its charter it is given the right to engage in furnishing entertainment and amusement for the general public; to engage in the hotel and restaurant business, and to construct drives, paths, elevators, and scenic ways, and to charge reasonable tolls and fares to persons using and visiting its property. As a part of its resort it constructed an improved road over its own land and that which it had leased in perpetuity. This road is three miles in length and runs from a point in the State highway between Asheville and Charlotte, North Carolina, to a parking place at the base of Chimney Rock Mountain. This road is owned and controlled by the plaintiff, and the plaintiff exercises the right to exclude any and all persons from its use.

Since May 1, 1920, the plaintiff has charged to each person using this road one dollar, and this whether the person using the road was on foot or horseback, or in a vehicle. If the vehicle contained more than one person, then each person was required to pay the dollar. At a point on said road about two and one-half miles from the State highway and about one-half mile from the parking place the plaintiff maintained a ticket office, which was open day and night and in which was located its representative. It was the duty of said representative to collect from each person passing his office the sum of one dollar. Upon its payment a strip ticket was issued to the person, which ticket was collected by the plaintiff's representative at the aforesaid parking place. This ticket was good only on the day of its purchase, and entitled the purchaser to parking space and to use the trails and stairways and visit the points of interest provided by the plaintiff at its resort.

The plaintiff was required by the collector of internal revenue for the western district of North Carolina and by the Commissioner of Internal Revenue to collect admission taxes on the amount of the charges made by it, and to pay the same to the said collector, and the amounts so paid to the said collector monthly from July 19, 1921, to June 20,

1925, amounted to the sum of $14,896.56. Within four years next after the payment of said taxes the plaintiff duly filed its application with the Commissioner of Internal Revenue for the refund thereof, which application was rejected by the said commissioner on January 6, 1926.

The plaintiff is now suing in this court for said amount.

The plaintiff contends that the charges upon which it was required to pay these taxes were toll charges, which it had the right to exact for the use of its road. The defendant maintains that the charges made by the plaintiff were admission charges to a place within the meaning and contemplation of the statutes providing for the collection of admission charges. The statutes involved are as follows:

Section 800 (a) of the revenue act of 1918, 40 Stat. 1057:

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission"; and section 800 (a) of the revenue act of 1921, 42 Stat. 227:

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission; but where the amount paid for admission is 10 cents or less, no tax shall be imposed."

Section 500 (a) of the revenue act of 1924, 43 Stat. 253:

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket, or subscription, to be paid by the person paying for such admission; but where the amount paid for admission is 50 cents or less, no tax shall be imposed."

The road here in question is a private road; it is not in the general acceptation of the word a toll road; it is owned and exclusively operated by the plaintiff for its own purposes, and the plaintiff exercises the right to exclude from its use any and all persons. The road is in effect an entrance to the plaintiff's resort, and no person can be admitted to this resort without payment of a fee which the plaintiff exacts. The place to which admission is granted by the payment of this fee is one which is maintained for the amusement and entertainment of the general public, and is such a place as

is contemplated by the statutes. The road is a source of revenue to the plaintiff and is an integral part of its resort. The charges are made, not as tolls, but as entrance fees to a place of entertainment for the general public; this is demonstrated by the fact that these fees are required to be paid only when the person or persons using the road enter the resort. No charges are made for the use of two and one-half miles of the road. We are of opinion that these charges are admission fees and come within the provisions of the statutes.

The petition of the plaintiff must be dismissed. It is so ordered.

Moss, *Judge;* Booth, *Judge;* and Campbell, *Chief Justice*, concur.

Graham, *Judge*, took no part in the decision of this case.

P. DE RONDE & COMPANY, INC., v. THE UNITED STATES

[No. F-332. Decided June 6, 1927]

On Demurrer to Amended Petition

Joint Resolution of February 12, 1923; finding of Sugar Equalization Board; acceptance of lesser amount; release.—Where, pursuant to the direction of the President, the United States Sugar Equalization Board paid to the plaintiff less than the amount found by said board, under the Joint Resolution of February 12, 1923, to have been plaintiff's actual loss in the importation of sugar from the Argentine Republic, and plaintiff accepted payment and executed a release of all claims against the said board, the claims so released were those against the Government, and the liability of the Government, if any, for the full amount of the loss, so found, was thereby discharged.

The Reporter's statement of the case:

Mr. W. W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. Robert Ash, opposed. *Mr. Thomas J. Reilly* was on the brief.

The averments of the amended petition are stated in the opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This case is before the court upon a demurrer to the amended petition. The plaintiff at the request of the Department of Justice in June, 1920, purchased a large quantity of sugar in the Argentine Republic for importation into the United States and to be sold under the direction of the department. It appears from the report of the Senate Committee on Agriculture and Forestry, set forth in the petition, that after the purchase by plaintiff of the sugar for importation the fact was widely heralded with the result that the price of sugar in the American market declined and plaintiff requested the Department of Justice to permit a resale of the sugar in the Argentine. This permit was refused and the plaintiff was required to bring the sugar to the United States and there was a large loss in its sale. The matter of this loss was brought to the attention of Congress by a joint resolution introduced for the relief of plaintiff. After extended hearings, the joint resolution was passed February 12, 1923, authorizing the President to require the United States Equalization Board to take over and dispose of the 5,000 tons of sugar imported from the Argentine Republic, and "to liquidate and adjust the entire transaction, paying to the corporation aforesaid such sum as may be found by said board to represent the actual loss sustained by them in said transaction." (See 42 Stat. 1226.) It is averred that on May 21, 1926, the President issued an Executive order reciting the joint resolution and that by virtue of it he had required the Sugar Equalization Board to take over the transaction mentioned and to pay plaintiff such sum as the board would find "to represent the actual loss sustained by P. De Ronde & Company (Incorporated) not exceeding $1,500,000 in amount" and further reciting that pursuant to the direction given the board had found the plaintiff's actual loss to have been "at least $1,500,000." The President accordingly directed the sugar board to pay plaintiff this sum "as and for a full and final liquidation,

adjustment, and settlement of the loss sustained by it in the transaction as in the joint resolution provided." It is averred by paragraph 7 of the petition that the sugar board "determined the loss as of April 30, 1925, to be $1,811,222.66," which did not include certain items of interest and "loss sustained on hypothecated securities" which it is said increased the actual loss sustained to over two millions of dollars. On May 24, three days after the President's order directing the payment of $1,500,000, the plaintiff received the sugar board's check drawn on the Treasurer of the United States for that amount and executed a release in the most comprehensive terms of all claims or demands it had or "ever can have" against the Sugar Equalization Board. Setting forth the several matters above detailed, the petition avers that upon the passage of the joint resolution "the United States became indebted to pay to the plaintiff company the amount of the actual loss sustained by that company in the transaction identified and described in said joint resolution."

It is contended for the plaintiff that its suit is based on the determination by the Sugar Board that the actual loss was $1,811,226.66 and that this determination constituted an obligation of the United States, its argument being that where an officer or agency of the Government is authorized by law to determine the Government's liability in a given case the determination by such officer or agency gives rise to an implied contract on the part of the Government to pay the amount so determined. See *Kaufman case*, 96 U. S. 567; *T. A. Gillespie Co. case*, 60 C. Cls. 923. But if this proposition be conceded, it would yet be true that the plaintiff has settled the claim and discharged the sugar board by the terms of the release. It can not treat the sugar board as representing or standing in the room of the Government for the purpose of liability but not of discharge or release. On the contrary, the release of the board was the release of the Government, if the latter was ever otherwise liable. The plaintiff alleges that the sugar board determined the loss to be as above stated, but it also alleges that the actual loss was greater. If plaintiff is not bound by the determination, it is

difficult to see how the Government is bound, but the inference is plain that the amount actually paid in settlement was agreed upon between the sugar board and plaintiff prior to the Executive order of May 21, 1926, and the order gave authority to close the matter by paying the sum that was accepted in full discharge of any liability. The right of the Government to settle or compromise a claim asserted against it for less than the amount claimed has been too long established to call for further discussion. See *Savage case*, 92 U. S. 382, 388.

The demurrer should be sustained and the amended petition dismissed. And it is so ordered.

MOSS, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.
GRAHAM, *Judge*, took no part in the decision of this case.

JOSEPH S. WILLIAMS, CHARLES M. BOYD, FRANK M. ESHLEMAN AND GARDNER B. WILLIAMS v. THE UNITED STATES[1]

[No. F-395. Decided June 6, 1927]

On Demurrer to Amended Petition

Jurisdiction; statute of limitations; tort.—Where the petition alleges that the amount sought to be recovered was paid to the Government at a date which is more than six years prior to filing of the petition, and under coercion, the plaintiff has not stated a case of which the Court of Claims can take jurisdiction, the action sounding in tort and being barred by the statute of limitations.

The Reporter's statement of the case:

Mr. W. F. Norris, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.
Mr. David A. Ellis, opposed.

The material averments of the amended petition are set forth in the opinion.

[1] Writ of certiorari denied.

Opinion of the Court

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The averment of the amended petition is that the plaintiff was coerced into paying the sum of $80,933.02 as excess profits upon transactions in wool, and that this amount was paid December 26, 1919. The original petition was filed December 21, 1926, more than six years after the alleged wrong and consequent payment. The claim, if any existed, is barred by the statute of limitations of six years applicable to claims asserted in the Court of Claims, and that statute is jurisdictional. See *Finn case*, 123 U. S. 227; *Wardwell case*, 172 U. S. 48, 52. Another reason urged by the Government is that if the payment complained of was made because of duress and the wrongful acts of Government officials, the action would sound in tort and would be, therefore, beyond the jurisdiction of this court. The case alleged can not be differentiated in principle from that of *United States* v. *Holland-America Lijn*, 254 U. S. 148, wherein it is said (p. 153):

"We think that the statement of the substance of the petitioner's claim, as above set forth, shows that it rested upon payments alleged to have been made under duress because of the wrongful and tortious acts of officials of the United States Government, acting without authority of law in coercing the plaintiff to pay the sums demanded. In many decisions of this court it has been held that by the provisions of the Tucker Act the Government did not subject itself to liability for the torts or wrongful acts of its officers."

Being without jurisdiction under either of the phases stated it only remains for the court to dismiss the petition. *Ex parte McCardle*, 7 Wall. 506, 515, where the Chief Justice says that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

MOSS, *Judge;* HAY, *Judge;* and BOOTH, *Judge*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.



CASES DECIDED

IN

THE SUPREME COURT

ON APPEAL FROM THE COURT OF CLAIMS OR ON CERTIORARI THERETO

YANKTON SIOUX TRIBE OF INDIANS v. UNITED STATES

[61 C. Cls. 40; 272 U. S. 351]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

1. Where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes, impossible of performance does not, without more, relieve the promisor from performing the other.
2. In an agreement, ratified by Congress in 1894, by which the Yankton Sioux Indians made a large cession of lands to the United States, it was stipulated, in part consideration for the cession and with respect to a small tract of other land containing pipestone quarries which were long claimed by the Indians under a treaty of 1858 with encouragement from Congress, (1) that if the Government questioned their ownership of that reservation, including the fee of the land as well as the right to work the quarries, the Secretary of the Interior should as speedily as possible refer the matter to the Supreme Court of the United States for decision, and (2) that if this were not done within one year from the ratification of the agreement by Congress, such failure, on the part of the Secretary, should be a waiver by the United States of all rights to the ownership of such pipestone reservation, and the same should thereafter be solely the property of the tribe. The Secretary, believing the provision for securing a decision of the court was beyond the power of Congress, and being advised by the Attorney General that it was impracticable, made no attempt to carry it out.

Syllabus

The land ceded was opened to settlement by the Government and passed largely into the possession of innocent purchasers, making restoration of the *status quo ante* impossible. In view of the equities growing out of these facts, *Held,* that the second of the alternative stipulations was enforceable even if the first was not.

Mr. JUSTICE SUTHERLAND delivered the opinion of the Supreme Court November 22, 1926.

SOUTHERN PACIFIC COMPANY v. UNITED STATES

[60 C. Cls. 662; 272 U. S. 445]

Judgment was rendered in part in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. Military impedimenta were shipped by the War Department by expedited service over a railroad which was bound by land-grant acts to transport property of the United States "at rates not exceeding 50 per cent of those paid by private shippers for the same kind of service." The railroad had no tariff for such service available to the public at large, but had filed with the Interstate Commerce Commission a special tariff applicable to such Government shipments, which made no land-grant deductions. *Held,* (1) that no contract of the United States to pay the special tariff rate could be implied from the fact that the shipments were made when the special tariff was the only one applicable on file, in the absence of proof that the contracting officers then knew of that tariff; (2) that the tariff having been filed without statutory authority, those officers were not chargeable, as a matter of law, with knowledge of it.
2. To recover in the Court of Claims the reasonable value of service rendered the Government, the claimant must prove its value.

Mr. JUSTICE STONE delivered the opinion of the Supreme Court November 22, 1926.

Syllabus

LUCKENBACH STEAMSHIP COMPANY v. UNITED STATES

[59 C. Cls. 628; 272 U. S. 533]

Judgment was rendered in part in favor of the United States in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

1. An appeal from a judgment of the Court of Claims (entered April 28, 1924) applied for while a motion for a new trial and amended findings was pending, though premature, was not a nullity, and became effective when the motion was denied and the appeal allowed.
2. Time did not run against the right to appeal while the motion for new trial and amended findings was pending.
3. The limits placed by Congress on the scope of review in this court of judgments of the Court of Claims, do not deprive defeated claimants of due process of law under the fifth amendment.
4. Under the law and rules governing the subject, review of judgments of the Court of Claims is confined to questions of law shown by the record when made up as the rules direct. Evidence is not included in the record, nor rulings on the admission or rejection of evidence.
5. Where the findings are ambiguous, contradictory or silent in respect of a material matter, or appear on their face ill founded in point of law, the case may and should be remanded for corrected or additional findings, but this is to be done only where the need for correction or addition is apparent either on the face of the findings or when they are examined in connection with the pleadings.
6. An order of the Court of Claims overruling a motion for a new trial, which brought nothing new into the case, *held* not reviewable.
7. Evidential and plainly subordinate matter is inappropriate to a finding of ultimate facts.
8. A finding of the value of property taken by the Government *held* a finding of fact, and not reviewable.
9. A claimant is not in position to press requests for findings which do not appear to have been tendered to the Court of Claims as required by the Rule.
10. Where an owner of boats which were taken over by the United States under the act of June 15, 1917, elected not to accept as full compensation the sum fixed by the President, but to accept

three-fourths of it, under the act, and sue for more, but recovered only the additional fourth which he had declined to accept, he was not entitled under the Fifth Amendment to interest on such deferred compensation.

Mr. JUSTICE VAN DEVANTER delivered the opinion of the Supreme Court November 23, 1926.

HEIRS OF SAMUEL GARLAND v. CHOCTAW NATION

PITCHLYNN ET AL., HEIRS AT LAW, v. CHOCTAW NATION

[59 C. Cls. 768, *id.*, 796; 272 U. S. 728]

Judgments were rendered in favor of the Choctaw Nation in the court below. On appeal the judgments were *affirmed*, the Supreme Court deciding:

1. Upon a reference to determine a claim for services on a *quantum meruit* basis, when the Court of Claims finds the amounts already paid the claimant, and dismisses his petition, or renders judgment for an additional sum, this is a determination that he was not entitled to more, although there is no definite finding of the value of the services.
2. In determining the value of services rendered the Choctaw Nation, the Court of Claims was not bound by opinions of the Choctaw legislature or executive officers.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Supreme Court January 3, 1927.

MAGUIRE & COMPANY v. UNITED STATES

[59 C. Cls. 575; 273 U. S. 67]

Judgment was rendered in favor of the United States in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

1. In a sale of cloth by the Government, a description, accompanying the advertisement for bids and giving the weight per yard, is

not a warranty, when bidders are invited to inspect the goods before bidding and notified that bids subject to inspection will not be received.

Mr. JUSTICE SANFORD delivered the opinion of the Supreme Court January 3, 1927.

GOODYEAR TIRE & RUBBER COMPANY v. UNITED STATES

[60 C. Cls. 486; 273 U. S. 100]

Judgment was rendered in favor of the United States in the court below. On appeal the judgment was *reversed*, the Supreme Court deciding:

1. In the provision in the revenue acts of 1918 and 1921, imposing a stamp tax of 2 cents per "$100 of face value or fraction thereof" on transfers of the legal title to shares or certificates of stock, "face value" is synonymous with par value. The par value fixed by the corporate charter at the time of transfer of a certificate is the true par value and must control, in assessment of the tax, over any different par value stated on the face of the certificate.

Mr. JUSTICE STONE delivered the opinion of the Supreme Court January 3, 1927.

JACOB REED'S SONS v. UNITED STATES

[60 C. Cls. 97; 273 U. S. 200]

Judgment was rendered in favor of the United States in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

1. The Dent Act (March 2, 1919) gave no cause of action on contracts made without authority, or on dealings which did not ripen into a contract.

Mr. JUSTICE BRANDEIS delivered the opinion of the Supreme Court January 24, 1927.

Syllabus

BARRETT COMPANY v. UNITED STATES

[60 C. Cls. 343; 273 U. S. 227]

Judgment was rendered in favor of the United States, in part, in the court below. On appeal the judgment was *reversed*, the Supreme Court deciding:

1. After cancellation of a contract under which supplies were to be be manufactured for the Government in a plant to be built with Government funds and to belong to the Government, the making of a supplemental agreement by which the contractor bought the plant for a price stated did not affect the contractor's claims growing out of the termination of the original contract, when the later agreement was expressly without prejudice to them.
2. The just compensation to which a claimant is entitled upon cancellation of a contract by the Government, under the act of June 15, 1917, is not to be measured by the profit that would have accrued under the contract, but must embrace that value which was taken from the contractor by the termination of the contract. The contractor is to be credited with his outlays reasonably made for the fulfillment of the contract.
3. In this case, where the obligation of the contractor was to manufacture and furnish to the Government a definite quantity of xylol monthly, up to a specified amount, in a plant which was to be erected by the contractor with Government funds and belong to the Government, just compensation, upon cancellation of the contract, must include what the contractor expended on the plant in excess of the cost as estimated and adopted in the contract and paid by the Government, in so far as such additional expenditure was required to fit the plant for production of the xylol as the contract contemplated.

Mr. CHIEF JUSTICE TAFT delivered the opinion of the Supreme Court February 21, 1927.

DE FOREST RADIO TELEPHONE COMPANY v. UNITED STATES

[60 C. Cls. 1034; 273 U. S. 236]

Judgment was rendered in favor of the United States in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

1. A license to make and use a patented article does not depend on formal language, and, as a defense to a subsequent suit for infringement, a license may be inferred from the patent owner's words and acts indicative of his consent, with a reservation of his right to compensation.

Mr. Chief Justice Taft delivered the opinion of the Supreme Court February 21, 1927.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. UNITED STATES

[59 C. Cls. 886; 273 U. S. 321]

Judgment was rendered in favor of the United States, in part, in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

1. A land-grant-aided railroad under a duty to carry government troops at not to exceed 50 per cent of the compensation charged private parties for like transportation must allow the Government the benefit of this reduction from reduced party rates which are offered the public.
2. Where the railroad has accepted the usual transportation request in issuing tickets for Government transportation, it can not avoid the land-grant reduction from a reduced rate offered the public upon the ground that by the tariff the rate was allowable only for cash paid in advance.

Mr. Justice Sutherland delivered the opinion of the Supreme Court February 21, 1927.

Syllabus

DAVIS SEWING MACHINE COMPANY v. UNITED STATES

[60 C. Cls. 201; 273 U. S. 324]

Judgment was rendered in favor of the Uinted States, in part, in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

A claim for profits anticipated from the performance of a contract with the Government can not be based on delays caused by changes made by the Government, when under the contract itself the remedy for such delays was to be an extension of time to the contractor, and when the contract was terminated by a supplemental agreement expressly releasing all claims for such profits.

Mr. JUSTICE SUTHERLAND delivered the opinion of the Supreme Court February 21, 1927.

UNITED STATES v. BURTON COAL COMPANY

[60 C. Cls. 294; 273 U. S. 337]

Judgment was rendered against the United States in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

1. Where a buyer, in violation of an executory contract of sale, refuses to accept the commodity sold, the seller may recover the difference between the contract price and the market value at the time when and at the place where deliveries should have been made.
2. The application of this rule is not affected by the fact that the seller relied on or intended procuring the commodity sold through contracts with third persons under which he would have been obliged to pay more than the market price existing when his purchaser refused to accept deliveries.

Mr. JUSTICE BUTLER delivered the opinion of the Supreme Court February 21, 1927.

Syllabus

FRED T. LEY & COMPANY v. UNITED STATES

[60 C. Cls. 654; 273 U. S. 386]

Judgment was rendered in favor of the United States in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

1. In a suit to recover the cost of public liability insurance paid under a building contract allowing reimbursement for such insurance "as the contracting officer might approve or require," a finding by the Court of Claims that there was no evidence that the expenditure was required or approved will not be reviewed by this court.

Mr. JUSTICE STONE delivered the opinion of the Supreme Court February 21, 1927.

THOMAS M. LIVINGSTON v. UNITED STATES

[60 C. Cls. 114; 273 U. S. 648]

Judgment was rendered in favor of the United States in the court below. On appeal it was decided:

Per curiam: Affirmed upon the authority of (1) *Tempel* v. *United States*, 248 U. S. 121, 129; *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330; *Pearson* v. *United States*, 267 U. S. 423; *Klebe* v. *United States*, 263 U. S. 188; (2) *Hijo* v. *United States*, 194 U. S. 315, 323.

Decided December 13, 1926.

JOHN F. JENKINS v. UNITED STATES

[60 C. Cls. 23; 273 U. S. 649]

Judgment was rendered in favor of the United States in the court below. On appeal the judgment was *affirmed* upon the authority of (1) *Tempel* v. *United States*, 248 U. S. 121, 129; *United States* v. *North American Transportation &*

Syllabus

Trading Co., 253 U. S. 330; *Pearson* v. *United States*, 267 U. S. 423; *Klebe* v. *United States*, 263 U. S. 188; (2) *Hijo* v. *United States*, 194 U. S. 315, 323.

Decided December 13, 1926.

MAX SIFF AND ALBERT L. SIFF, TRADING AS SIFF BROTHERS COMPANY, v. UNITED STATES

[60 C. Cls. 331; 273 U. S. 653]

Judgment was rendered in favor of the United States in the court below. On appeal it was decided:

Per curiam: Affirmed upon the authority of *Chamberlain Machine Works* v. *United States*, 270 U. S. 347.

Decided January 10, 1927.

INDUSTRIAL ENGINEERING COMPANY v. UNITED STATES

[60 C. Cls. 766; 273 U. S. 659]

Judgment was rendered in favor of the United States in the court below. On appeal it was decided:

Per curiam: Affirmed on the authority of *Jacob Reed's Sons, Inc.* v. *United States*, 273 U. S. 200.

Decided January 24, 1927.

A. L. FERGUSON ET AL. v. UNITED STATES

[60 C. Cls. 649; 273 U. S. 660]

Judgment was rendered in favor of the United States in the court below. On appeal it was decided:

Per curiam: Affirmed on the authority of *Jacob Reed's Sons, Inc.* v. *United States*, 273 U. S. 200 and of *Baltimore & Ohio Railroad Co.* v. *United States*, 261 U. S. 592.

Decided January 24, 1927.

JACOB M. DICKINSON, RECEIVER OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. v. UNITED STATES

[59 C. Cls. 209; 273 U. S. 663]

Judgment was rendered in favor of the United States in the court below. On appeal it was decided:

Per curiam: Affirmed on the authority (1) of *Illinois Central Railroad Co.* v. *United States*, 265 U. S. 209, and (2) of *Southern Pacific Co.* v. *United States*, 268 U. S. 263.

Decided February 28, 1927.

GEORGE F. PAWLING & COMPANY v. UNITED STATES

[60 C. Cls. 699; 273 U. S. 665]

Judgment was rendered in part in favor of and in part against the United States in the court below. On appeal it was decided:

Per curiam: Affirmed on the authority of *Robinson* v. *United States*, 261 U. S. 486.

Decided March 7, 1927.

SEABOARD AIR LINE RAILWAY v. UNITED STATES

[59 C. Cls. 250; 273 U. S. 672]

Judgment was rendered in favor of the United States in the court below. On appeal it was decided:

Per curiam: Affirmed on the authority of *St. Louis, Brownsville & Mexico Railway Co.* v. *United States*, 268 U. S. 169, and *Southern Pacific Co.* v. *United States*, 268 U. S. 263.

Decided March 21, 1927.

Syllabus

FRANKLIN D'OLIER ET AL. v. UNITED STATES

[61 C. Cls. 895; 273 U. S. 700]

Petition for writ of certiorari *denied* by the Supreme Court October 11, 1926.

JULIUS KESSLER & CO. v. UNITED STATES

[61 C. Cls. 723; 273 U. S. 700]

Petition for writ of certiorari *denied* by the Supreme Court October 11, 1926.

S. D. GUGGENHEIM ET AL. v. UNITED STATES

[61 C. Cls. 571; 273 U. S. 704]

Petition for writ of certiorari *denied* by the Supreme Court October 18, 1926.

GEORGE F. PAWLING & CO. v. UNITED STATES

[62 C. Cls. 123; 273 U. S. 705]

Petition for writ of certiorari *denied* by the Supreme Court October 18, 1926.

HOWARD P. CONVERSE ET AL. v. UNITED STATES

[61 C. Cls. 672; 273 U. S. 708]

Petition for writ of certiorari *denied* by the Supreme Court October 18, 1926.

ERIC LANGE ET AL v. UNITED STATES

[61 C. Cls. 682; 273 U. S. 708]

Petition for writ of certiorari *denied* by the Supreme Court October 18, 1926.

ILLINOIS CENTRAL RAILROAD CO. v. UNITED STATES

[62 C. Cls. 61; 273 U. S. 710]

Petition for writ of certiorari *denied* by the Supreme Court October 18, 1926.

SUBMARINE SIGNAL CO. v. UNITED STATES

[61 C. Cls. 652; 273 U. S. 713]

Petition for writ of certiorari *denied* by the Supreme Court October 18, 1926.

AUBURN & ALTON COAL CO. v. UNITED STATES

[61 C. Cls. 438; 273 U. S. 714]

Petition for writ of certiorari *denied* by the Supreme Court October 25, 1926.

UNITED STATES v. MAY McKINNEY ET AL.

[62 C. Cls. 180; 273 U. S. 716]

Petition for writ of certiorari *denied* by the Supreme Court October 25, 1926.

WILLIAM A. ZEIDLER v. UNITED STATES

[61 C. Cls. 537; 273 U. S. 724]

Petition for writ of certiorari *denied* by the Supreme Court November 23, 1926.

MISSOURI-KANSAS-TEXAS RAILROAD CO. OF TEXAS v. UNITED STATES

[62 C. Cls. 373; 273 U. S. 725]

Petition for writ of certiorari *denied* by the Supreme Court November 23, 1926.

STANDARD TRANSPORTATION CO. v. UNITED STATES

[61 C. Cls. 906; 273 U. S. 732]

Petition for writ of certiorari *denied* by the Supreme Court November 29, 1926.

CHARLES M. COTTERMAN v. UNITED STATES

[62 C. Cls. 415; 273 U. S. 732]

Petition for writ of certiorari *denied* by the Supreme Court November 29, 1926.

H. A. PHARR, TRUSTEE IN BANKRUPTCY OF MOBILE SHIPBUILDING CO., v. UNITED STATES

[62 C. Cls. 445; 273 U. S. 732]

Petition for writ of certiorari *denied* by the Supreme Court November 29, 1926.

JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY CO. v. UNITED STATES

[62 C. Cls. 16; 273 U. S. 732]

Petition for writ of certiorari *denied* by the Supreme Court November 29, 1926.

CITY OF WICHITA FALLS, TEXAS v. UNITED STATES

[62 C. Cls. 239; 273 U. S. 750]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1927.

AMERICAN RAILWAY EXRESS CO. v. UNITED STATES

[62 C. Cls. 615; 273 U. S. 750]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1927.

LUTHER J. BAILEY AND JAMES E. FULGHAM v. UNITED STATES

[62 C. Cls. 77; 273 U. S. 751]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1927.

AMERICAN EXCHANGE IRVING TRUST CO. (FORMERLY IRVING BANK-COLUMBIA TRUST CO.), EXECUTOR, v. UNITED STATES

[62 C. Cls. 564; 273 U. S. 751]

Petition for writ of certiorari *denied* by the Supreme Court February 28, 1927.

CLEMENT H. BETTS v. UNITED STATES

[62 C. Cls. 1; 273 U. S. 762]

Petition for writ of certiorari *denied* by the Supreme Court March 21, 1927.

UNITED STATES v. LUCIA E. BLOUNT ET AL.

[59 C. Cls. 328; 273 U. S. 769]

On appeal. *Dismissed* by the Supreme Court October 4, 1926, on motion of appellant.

UNITED STATES v. CURTIS & CO. MANUFACTURING CO.

[62 C. Cls. 115; 273 U. S. 771]

Petition for writ of certiorari *dismissed* by the Supreme Court October 12, 1926, on motion of petitioner.

UNITED STATES v. GEORGE C. TAYLOR, AS PRESIDENT OF THE AMERICAN EXPRESS CO.

[60 C. Cls. 429; 273 U. S. 773]

On appeal. *Dismissed* by the Supreme Court November 23, 1926, on motion of appellant.

CHAPMAN S. CLARK v. UNITED STATES

[59 C. Cls. 940; 273 U. S. 774]

On appeal. Judgment *reversed* by the Supreme Court December 7, 1926, on confession of error, and cause remanded.

UNITED STATES v. HURON NAVIGATION CO.

[60 C. Cls. 770; 273 U. S. 777]

On appeal. *Dismissed* by the Supreme Court January 10, 1927, on motion of appellant, and mandate granted.

Syllabus

HURON NAVIGATION CORPORATION v. UNITED STATES

[60 C. Cls. 770; 273 U. S. 778]

On appeal. *Dismissed* by the Supreme Court January 20, 1927, per stipulation of counsel.

PRESSED STEEL CAR CO. v. UNITED STATES

[62 C. Cls. 191; 273 U. S. 780]

On petition for writ of certiorari. Certiorari granted, and the judgment of the court below, in so far as it determined that the plaintiff was not entitled to recover, was *affirmed* by the Supreme Court February 28, 1927, and the judgment in favor of the United States upon its counterclaim *modified*, per stipulation of counsel, and the cause remanded.

TOXAWAY MILLS v. UNITED STATES

[61 C. Cls. 363; 273 U. S. 781]

On writ of certiorari. Judgment of the court below was *reversed* by the Supreme Court March 14, 1927, on confession of error, on motion of appellee, and mandate granted.

LIGGETT & MYERS TOBACCO CO. v. UNITED STATES

[61 C. Cls. 693; 274 U. S. 215]

Judgment was rendered in part in favor of and in part against the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

A continuing order for naval supplies made during the late war by direction of the President, under acts of March 4 and June 15, 1917, examined and *held* to be not an offer to purchase

Syllabus

but a command, acceptance of which "subject to conditions" specified, did not make a contract; therefore, the property delivered under it was taken by eminent domain, and the owner was entitled to just compensation, viz., the value at the time of taking plus interest on the part not paid.

Mr. Justice Butler delivered the opinion of the Supreme Court May 2, 1927.

UNITED STATES v. LUDEY

[61 C. Cls. 126; 274 U. S. 295]

Judgment was rendered against the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

1. Under the income and excess-profits provisions of the revenue act of 1916, as amended by revenue act of 1917, in determining the existence and amount of profit realized from a sale of oil-mining properties—land, leases, and equipment—the cost of the property sold is the original cost to the taxpayer (if purchased after March 1, 1913, or its value on that date if acquired earlier for less) diminished by deductions for depreciation and depletion occurring between the dates of purchase (or March 1, 1913) and sale.
2. The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used.
3. When a plant is disposed of after years of use, the thing then sold is not the whole thing originally acquired. The amount of the depreciation must be deducted from the original cost of the whole in order to determine the cost of that disposed of in the final sale of properties.
4. This rule applies to mining as well as to mercantile business.
5. The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. Because the quantity originally in the reserve is not actually known, the percentage of the whole, withdrawn in any year, and hence the appropriate depletion charge, is necessarily a rough estimate.
6. The amounts of depreciation and depletion to be deducted from cost to ascertain gain on a sale of oil properties are equal to the aggregates of depreciation and depletion which the taxpayer was entitled to deduct from gross income in his income-tax

Syllabus

returns for earlier years; but are not dependent on the amounts which he actually so claimed.

Mr. JUSTICE BRANDEIS delivered the opinion of the Supreme Court May 16, 1927.

PHELPS v. UNITED STATES

[61 C. Cls. 1044; 274 U. S. 341]

Judgment was rendered in the court below in part in favor of and in part against the United States. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

1. A claim for just compensation for the use of property taken by the Government is "founded upon the Constitution," within the meaning of Judicial Code, section 145.
2. A claim for just compensation for property taken for public use by officers or agents of the United States pursuant to an act of Congress, is a claim founded upon an implied contract. Judicial Code, section 145.
3. Where the use of private property is taken by eminent domain and paid for later, the owner is entitled to the value at the time of taking and such additional amount that the whole may be equivalent to the value of such use at the time of the taking paid contemporaneously with the taking.
4. Such additional allowance may be measured by a reasonable rate of interest, but is not properly interest, and is not within the prohibition of interest before judgment found in Judicial Code, section 177.

Mr. JUSTICE BUTLER delivered the opinion of the Supreme Court May 16, 1927.

UNITED STATES v. S. S. WHITE DENTAL MANUFACTURING COMPANY

[61 C. Cls. 143; 274 U. S. 398]

Judgment was rendered against the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. Under section 234 of the revenue act of 1918 which authorizes the deduction from gross income in the computation of income taxes

Syllabus

of "Losses sustained during the taxable year not compensated by insurance or otherwise," and Treasury regulations providing that losses deducted "must usually be evidenced by closed or completed transactions," but specifically authorizing deduction of worthless debts and corporate stock, the American creditor, and owner of the stock, of a corporation in Germany, was entitled to deduct the entire amount of such investment from gross income when the assets and business of the corporation were sequestered by the German Government during the war.

2. Such sequestration of enemy property was within the rights of the German Government as a belligerent power and when effected left the corporation without right to demand its release or compensation for its seizure, at least until the declaration of peace.
3. The transaction—the sequestration—causing the loss was "closed and completed" when the seizure was made, and the loss was then deductible, although later the German Government bound itself to repay and an award was made by the Mixed Claims Commission which may result in recovery.

MR. JUSTICE STONE delivered the opinion of the Supreme Court May 16, 1927.

CASES DECIDED

IN

THE COURT OF CLAIMS

FEBRUARY 1, 1927, TO JUNE 30, 1927

INCLUSIVE, IN WHICH JUDGMENTS WERE RENDERED BUT NO OPINIONS DELIVERED, OR WHEREIN FINDINGS OF FACT AND CONCLUSIONS WERE MADE FOR REPORT TO CONGRESS

No. D–520. FEBRUARY 14, 1927

Chicago, Milwaukee & St. Paul Ry. Co.
Transportation of the National Guard, $4,844.39.

No. F–190. FEBRUARY 14, 1927

American Trust & Banking Co.
Infringement of patent. Dismissed.

No. C–888. FEBRUARY 21, 1927

Minneapolis & St. Louis R. R. Co.
Transportation of Government property, $4,899.99.

No. C–1310. FEBRUARY 21, 1927

New York, New Haven & Hartford R. R. Co.
Party fare combinations, $19,779.14.

No. C–1311. FEBRUARY 21, 1927

Central New England Ry. Co.
Party fare combinations, $8,998.81.

No. F–166. FEBRUARY 21, 1927

Northern Pacific Ry. Co.
Transportation of the National Guard, $30,742.53.

No. D–794. FEBRUARY 21, 1927

Goodyear Tire & Rubber Co.

Stock transfer tax, $12,525.57. On mandate of Supreme Court. (60 C. Cls. 486; 273 U. S. 100.)

No. F–122. FEBRUARY 21, 1927

Dan James McGilvray.

Damages from fires started by railroad under Federal control; acceptance of stipulated judgment in State court. (See 62 C. Cls. 533.) Dismissed.

No. F–123. FEBRUARY 21, 1927

Frank L. Redfield.

Damage from fires started by railroad under Federal control; acceptance of stipulated judgment in State court. (See 62 C. Cls. 533.) Dismissed.

No. F–311. FEBRUARY 24, 1927

James L. Wilmeth.

Pay for arrears, classified service. Dismissed.

No. D–225. FEBRUARY 25, 1927

Frederick E. Trotter.

Public Health Service pay; pay while on leave, $8,455.98. (See 62 C. Cls. 568.)

No. E–288. MARCH 7, 1927

Cleaver M. Liphart.

Failure to deliver rope bought under contract. Dismissed.

No. E–323. APRIL 4, 1927

Grace Bros. & Co. Ltd.

Return of deposit for delivery of cotton. Dismissed.

No. F–18. APRIL 4, 1927

William Leonard Horbury.

Merchandise lost on Government vessel. Dismissed.

No. F-19. APRIL 4, 1927

Walter Brierley et al.
Merchandise lost on Government vessel. Dismissed.

No. F-20. APRIL 4, 1927

Hugh Laughland Roxburgh et al.
Merchandise lost on Government vessel. Dismissed.

No. F-21. APRIL 4, 1927

George Valentine Day et al.
Merchandise lost on Government vessel. Dismissed.

No. F-22. APRIL 4, 1927

Robert Holder et al.
Merchandise lost on Government vessel. Dismissed.

CONGRESSIONAL No. 17337. APRIL 4, 1927

P. L. Andrews Corp.
Rescission of Navy order. Findings amended. (See 60 C. Cls. 1035.)

No. D-49. APRIL 4, 1927

Bath Iron Works, Ltd.
Contract for torpedo destroyers. Dismissed.

No. B-424. APRIL 4, 1927

General Manufacturing Co.
Contract for purchase and removal of waste. Dismissed.

No. D-859. APRIL 4, 1927

Charles Rosner.
Contract for woolen service coats. Dismissed.

No. B-188. MAY 2, 1927

American Electro-Products Co.
Contract for erection of acid plant. Dismissed.

No. D–536. MAY 2, 1927

Chesapeake & Ohio Ry. Co.
Refund for messages transmitted under contract. Dismissed.

No. E–65. MAY 2, 1927

Trego Motors Corporation.
Contract for aircraft engines. Dismissed.

No. E–205. MAY 2, 1927

Marvin & Company.
Refund of purchase price on cartridges. Dismissed.

No. D–802. MAY 16, 1927

Leman L. Babbitt.
Increase in pay, aviation duty, Navy, $170.52.

No. D–806. MAY 16, 1927

Clarence A. Pottinger.
Increase in pay, aviation duty, Navy, $44.84.

No. A–239. MAY 16, 1927

Pressed Steel Car Co.
Fabrication of steel for ships, $126,202.15 in favor of United States, with costs. On mandate of Supreme Court. (62 C. Cls. 191; 273 U. S. 780.)

No. A–212. MAY 27, 1927

Twin City Forge & Foundry Co.
Contract for manufacture of shells, $47,663.23 in favor of the United States, with costs. On mandate of Supreme Court. (60 C. Cls. 673.)

No. D–109. JUNE 6, 1927

Frank R. McCrary.
Additional pay, aviation duty, Navy, $3,242.55.

CASES OF PAY AS CANDIDATE FOR COMMISSION, UNITED STATES ARMY, DISMISSED BY THE COURT OF CLAIMS

ON FEBRUARY 14, 1927

E-337. Warren H. Savary.

ON APRIL 4, 1927

D-1030. Charles R. Fadeley.
D-1031. Ray H. Jordan.
E-67. Abram B. Pratt.
E-69. John R. Studwell.
E-411. Stephen Y. McGiffert.
E-615. James C. White.

CASES PERTAINING TO REFUND OF TAXES DISMISSED BY THE COURT OF CLAIMS

ON FEBRUARY 7, 1927

E-150. Louis G. Clark, jr., et al.
E-216. Reginald Brooks.
F-4. Roshek Bros. Co.
F-12. Herbert Gans.
F-13. Richard Meyer.
F-14. John Gans.
F-15. Franziska Gans.

ON FEBRUARY 14, 1927

B-382. Harris Strawn Oil Co.
C-769. Erskine Hewitt.
E-162. Alice Grace D'Oench.
E-214. Maurice Bouvier.
E-280. Dean Sage.
E-399. Milton S. Erlanger.
E-400. Sidney C. Erlanger.
E-401. Abraham Erlanger.
E-406. Charles Erlanger.
E-408. Anna P. Sage.
F-58. Fawcus Machine Co.
F-59. Fawcus Machine Co.
F-186. Cornell Mills.
F-398. Peterborough Railroad.

ON APRIL 4, 1927

D-362. Atlantic Coast Line R. R. Co.
D-555. Norfolk & Western Ry. Co.
D-834. Epping-Carpenter Pump Co.
E-35. Charles V. Bossert.
E-491. Davidson Ore Mining Co.
F-25. Pratt & Whitney Co.
F-56. Janesville Coal Co.

ON MAY 2, 1927

D-285. Boston & Maine R. R. Co.
D-306. Seaboard Air Line Ry. Co.
D-528. Southern Ry. Co.
E-152. Janet Grace.
E-155. Joseph P. Grace.
E-456. Herbert F. Johnson et al.
F-55. M. S. Pyne et al.
F-140. William H. Larkin, jr.

ON JUNE 6, 1927

E-492. Robert Clark Ream.
F-216. J. M. Stevenson et al.
H-31. Vacuum Oil Co.

CASES PERTAINING TO PAY OF HIGHER COMMAND, ARMY, DISMISSED BY THE COURT OF CLAIMS

ON APRIL 4, 1927

C-779. Edwin S. Olsmith.
C-781. Alan P. Hume.
C-974. Nels G. Sandelin.
D-111. William J. Rea.
D-305. James V. Falisi.
D-791. Lucian S. Breckenridge.
D-991. Frank S. Dearing.

CASES PERTAINING TO TRANSPORTATION FURNISHED THE GOVERNMENT BY COMMON CARRIERS DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PLAINTIFF

ON MAY 9, 1927

D-513. Chicago, Burlington & Quincy R. R. Co.
D-517. Chicago, Rock Island & Pacific Ry. Co.
D-635. New York Central R. R. Co.
D-761. Chicago & North Western Ry. Co.
D-762. William W. Wheelock et al., receivers, Chicago & Alton R. R. Co.
E-30. Union Pacific R. R. Co.
E-76. Oregon Short Line R. R. Co.
E-93. Oregon-Washington R. R. & Nav. Co.
E-204. Atlantic Coast Line R. R. Co.
E-328. Union Pacific R. R .Co.
E-351. Oregon - Washington R. R. & Nav. Co.
E-373. Oregon Short Line R. R. Co.
E-407. Los Angeles & Salt Lake R. R. Co.
E-423. Atlantic Coast Line R. R. Co.
E-425. Morgan's Louisiana & Texas R. R. & S. S. Co.

ON JUNE 6, 1927

B-77. El Paso & Southwestern Co. et al.
E-148. New York Central R. R. Co.

CASES OF UNIFORM GRATUITY DISMISSED BY THE COURT OF CLAIMS

ON MAY 2, 1927

C-164. John T. Stanton.

ON MAY 16, 1927

C-590. Edward P. Mullaly.
C-861. Frank L. Kelly.
C-908. Walter W. Wensinger.
C-1217. Gerald K. Hemsing.
D-341. William H. May.
D-743. David R. Higbee.
D-759. Laird M. Morris.
E-70. Robert W. Wimberly.
E-120. Louis S. Mueller.

INDEX DIGEST

ACCEPTANCE OF PAYMENT.

See Army Pay, III.

ARMY PAY.

I. The authority to assign a junior Army officer in time of war or public danger to take command of an organization while a senior officer is present therein and available is in the President. Where such an assignment has been made without the authority of the President it is void and the junior officer is not entitled to the pay appertaining to the higher command. *Kinsolving*, 79; *Campbell*, 133.

II. During the period that a duly qualified junior military aviator is detailed to "duty requiring him to participate regularly and frequently in aerial flights" he is entitled to the pay provided for such duty. *Emmons*, 121.

III. Where a statute fixes the pay of an Army officer his compensation rests upon an act of Congress and not upon a contract, and his acceptance of less than the statutory compensation does not estop him from claiming the full amount. *Id.*

IV. Upon the signing of the armistice November 11, 1918, there was no enemy to operate against within the meaning of the act of April 26, 1898, providing for increase of pay to officers exercising a higher command. *Campbell*, 133.

V. The proviso in the act of September 14, 1922, 42 Stat. 840, 841, that "the discharge and recommission of officers in the next lower grade shall not operate to reduce the pay or allowances which they are now receiving or to deprive them of credit for service now counted for purposes of pay or retirement," does not give increased pay for future service, and where an officer who was a captain in the Army June 30, 1922, is demoted to the rank of first lieutenant November 18, 1922, while in his third pay period, he is not entitled after said period, if still in the lower grade, to increase of longevity pay that would have resulted if his service in the lower grade were counted as that of a captain. *Eagle*, 157.

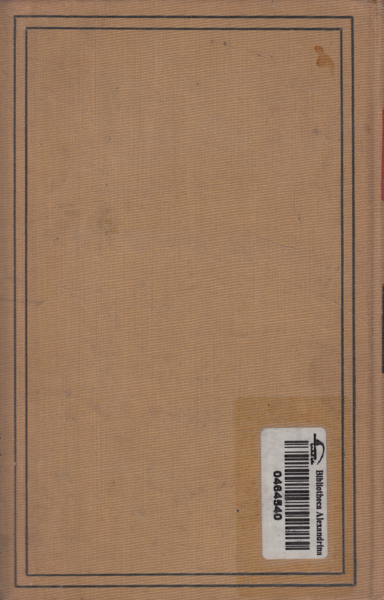
VI. A civilian clerk, native of the Philippine Islands, in the office of the department quartermaster, Philippine Department, whose compensation is adjustable by a board of officers appointed under authority of the Secretary of










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